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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONER

v.

CAL-ALMOND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
RICHARD H. SEAMON
Assistant to the Solicitor General
BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

23pp

QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to a marketing order issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, to require the handlers of California almonds to fund a generic advertising program for that commodity.

PARTIES TO THE PROCEEDINGS

The petitioner is the United States Department of Agriculture, which was the defendant below. The respondents, which were the plaintiffs below, are Cal-Almond, Inc., Carlson Farms, Gold Hills Nut Co., Inc., Gourmet Packing, Inc., Frazier Nut Farms, Inc., and Ellen Briones, Chapter 7 Trustee in Bankruptcy for Saulsbury Orchards and Almond Processing, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Agriculture, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals concerning remedial issues (App. A)[1] is reported at 67 F.3d 874. The order of the district court (App. B) and the judg-

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[1] References to "App." are to the separately bound volume of the appendix to the petition in this case.

ment of the district court (App. C) concerning remedial issues are unreported.

The initial opinion of the court of appeals (App. D), which addressed the First Amendment question presented herein and remanded the case to the district court for further proceedings on remedial issues, is reported at 14 F.3d 429. None of the four district court orders that were the subject of the initial court of appeals opinion (Apps. E, F, G, and H) are officially reported. Three of those orders (Apps. E, F, and G) are published, however, at 51 Agric. Dec. 44, 85, and 79 (respectively).

The opinions of the Judicial Officer of the Department of Agriculture (Apps. I, J, and K) are reported at 50 Agric. Dec. 23, 171, and 183 (respectively).

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1995. A petition for rehearing was denied on February 20, 1996. App. L. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (Act) are 7 U.S.C. 608a(6), 608c(1)-(4), (6), (7) and (15), and 610(b) and (c). They are reproduced at App. M.

The relevant regulations implementing the Act are 7 C.F.R. 981.30, 981.38, 981.39, 981.40(a), (d) and (e), 981.41, 981.80, 981.81(a), and 981.441 (1992). They are reproduced at App. N.

STATEMENT

This case involves a First Amendment challenge to provisions in the marketing order for California almonds issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.* The challenged provisions impose mandatory assessments on the handlers (*i.e.*, processors and distributors, see 7 C.F.R. 981.13, 981.16 (1992)) of California almonds; those assessments are used in part to finance a generic advertising program for California almonds (7 C.F.R. 981.41 (1992)). The district court held that the generic advertising program does not violate the First Amendment. The Ninth Circuit reversed, holding that the program is unconstitutional under the three-part test for reviewing restrictions on commercial speech set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and remanded the case for further proceedings on the appropriate remedy for the perceived First Amendment violation. At the time of the Ninth Circuit's decision, the Secretary was considering revisions to a portion of the marketing order for California almonds, including provisions upon which the court had relied, in part, in striking down the generic advertising program. In light of the pendency of the proposed revisions, the Secretary did not petition for a writ of certiorari to review the Ninth Circuit's judgment with respect to the First Amendment issue at that time.

In a subsequent case, however, the Ninth Circuit relied on its decision in this case to sustain a First Amendment challenge to the generic advertising programs for California peaches, nectarines, and

plums established under the AMAA marketing orders for those fruits. See *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367 (1995). The Secretary has filed a petition for a writ of certiorari in *Wileman Bros.* seeking review of the Ninth Circuit's holding on the First Amendment issue in that case. No. 95-1184 (filed Jan. 24, 1996).

On remand in the present case, the district court entered a monetary award against the government. The court of appeals affirmed in part and reversed in part, holding that respondents were entitled to a refund of the assessments that they had paid for administration of the generic advertising program, but were not entitled to reimbursement of the money that they had paid to third parties for "creditable" advertising—*i.e.*, advertising for which they had received credit against their assessments.[2]

1. a. Congress enacted the AMAA based on the following finding (7 U.S.C. 601):

> [T]he disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure[,] and * * * these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

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[2] Respondents' First Amendment challenge to the generic advertising program for almonds concerned the crop years 1980-1981 through 1992-1992. Hereafter, we cite to the almond marketing order in effect in 1992, codified at 7 C.F.R. Pt. 981 (1992), unless otherwise noted.

The goal of the Act is to "establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602(1). The Act specifies several means by which the Secretary is to bring about such conditions. Those means include the establishment of "minimum standards of quality and maturity" and of "production research, marketing research, and development projects." 7 U.S.C. 602(3). This case concerns the latter means: marketing promotion in the form of a generic advertising program.

To carry out his duties under the Act, the Secretary is authorized to issue marketing orders for certain commodities, including almonds. 7 U.S.C. 608c(1) and (2). A marketing order may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). It may also provide for "production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). Such projects may—with respect to certain commodities, including almonds—include "paid advertising." *Ibid.*[3] The projects are funded by mandatory assessments on handlers. *Ibid.*; see also 7 U.S.C.

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[3] The provision authorizing marketing orders to provide for marketing research and development projects was added to the AMAA in 1954. Agricultural Act of 1954, Pub. L. No. 83-690, § 401(c), 68 Stat. 906. The provision specifying that those projects may include "paid advertising" with respect to certain commodities was first added to the AMAA by the Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 403, 76 Stat. 632 (authorizing paid advertising of cherries); see also Act of Nov. 25, 1970, Pub. L. No. 91-522, § 1(1) and (2), 84 Stat. 1357 (extending "paid advertising" provision to almonds).

610(b)(2)(ii) (handlers shall pay annual assessments equal to their pro rata share of expenses of administering marketing orders). The marketing orders for almonds and certain other commodities, however, may authorize a handler to receive credit against its assessment for amounts it spends in purchasing its own advertising. 7 U.S.C. 608c(6)(I).

Before issuing a marketing order for a commodity, the Secretary conducts a formal rulemaking proceeding and must in general obtain approval of the order by either two-thirds of the producers (growers) of the commodity, or the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. 608c(3)-(4), (8) and (9)(B); see *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 342 (1984). Once in place, a marketing order is administered under the Secretary's supervision by a committee that typically is composed of producers and handlers of the regulated commodity. 7 U.S.C. 608c(7)(C), 610. The members of the committee are appointed by the Secretary, serve without compensation, and are subject to removal by the Secretary at any time. See, *e.g.*, 7 C.F.R. 981.33, 981.37, and 981.40(d) (relating to Almond Board of California). Among other duties, the committee recommends a yearly budget for administering the marketing order, which includes a budget for advertising and other types of promotion; the Secretary may accept or reject that recommendation. 7 U.S.C. 608c(7)(C); see, *e.g.*, 7 C.F.R. 981.41. After the Secretary adopts a budget, he promulgates a regulation prescribing assessments on handlers to fund the budget. See 7 U.S.C. 610(c); 7 C.F.R. 981.41(e), 981.80, 981.81(a).

A marketing order may be discontinued in two ways. The Secretary must terminate or suspend an

order if he finds that it "obstructs or does not tend to effectuate the declared policy" of the AMAA. 7 U.S.C. 608c(16)(A)(i). In addition, the Secretary must terminate an order when he determines that a majority of the producers does not support it. 7 U.S.C. 608c(16)(B).

b. This case concerns the marketing order for California almonds, which is administered by the Almond Board of California.[4] The order was first promulgated in 1950 (App. 51a), and it has authorized the Board to conduct a generic advertising program for California almonds since 1971 (36 Fed. Reg. 20,887 (1971); see 59 Fed. Reg. 35,224 (1994)). The Board's activities, including its conduct of the generic advertising program, are funded by mandatory assessments on handlers based on the volume of the almonds that they handle. See App. 52a & n.1.

At relevant times, the marketing order for California almonds permitted a handler to receive credit against its assessment for purchasing its own advertising. 7 C.F.R. 981.41(c) (1992). Credit was available whether the handler's advertising promoted California almonds generically or the handler's own brand. 7 C.F.R. 981.441(c)(3)(i)(A) and (B). To earn credit, however, the advertising had to satisfy the requirements of the creditable advertising regulation, 7 C.F.R. 981.441. Under that regulation, "[t]he clear and evident purpose of each advertisement" had to be "to promote the sale, consumption, or use of

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[4] The fact that the order is limited to almonds grown in California reflects the AMAA's requirement that marketing orders be restricted "to the smallest regional production areas * * * practicable" and consistent with the Act. 7 U.S.C. 608c(11)(B).

California almonds." 7 C.F.R. 981.441(c)(2). In addition, the regulation provided that no credit was available for advertising that referred to "more than two complementary branded products"; for advertising that promoted "noncomplementary" products or "competing nuts"; or for advertising that "direct[ed] consumers to one or more named retail outlets" not operated by the handler. 7 C.F.R. 981.441(c)(5). Handlers were free to engage in any advertising that they wished, see 7 U.S.C. 608c(10), but they could receive credit only for advertising that met the regulatory requirements.

2. a. The present case arose from administrative petitions filed with the Secretary of Agriculture by respondents under 7 U.S.C. 608c(15)(A), which permits handlers to ask the Secretary to modify, or exempt them from, marketing orders that are "not in accordance with law." Respondents alleged, among other things, that the generic advertising program for California almonds, including certain provisions of the creditable advertising regulation, violated the First Amendment. App. 216a, 291a-292a. Upon review of the decisions on the petitions by an administrative law judge, the Judicial Officer of the Department of Agriculture (JO) rejected respondents' First Amendment challenge. App. 291a-299a, 420a-424a.

b. Respondents sought review of the JO's decisions in the United States District Court for the Eastern District of California, pursuant to 7 U.S.C. 608c(15)(B). The district court affirmed the JO's decisions. App. 96a-150a, 151a-185a, 186a-197a.

c. The court of appeals reversed in relevant part, holding that the generic advertising program for

California almonds violates the First Amendment. App. 49a-95a.[5]

The court of appeals held, first, that the program implicates respondents' "right to free speech and their right to free association." App. 58a. The court based that holding primarily on *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). In *Frame*, the Third Circuit had held that the generic advertising program for beef that is established by federal law and funded by mandatory industry assessments implicates the First Amendment rights of beef producers subject to the assessments. The court of appeals in this case stated that "[t]he Board's almond promotion program closely resembles the beef promotion program at issue in *Frame*." App. 57a.

The Third Circuit in *Frame upheld* the generic beef promotion program under the standard applied in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), to a free-association claim. Here, in contrast, the Ninth Circuit struck down the generic almond promotion program under what it characterized as the "less stringent" standard articulated in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, *supra*, for reviewing restrictions on commercial speech. App. 59a-60a. The Ninth Circuit recognized that the almond program satisfied the first part of the *Central Hudson* test by promoting the "substantial" govern-

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[5] The court of appeals rejected respondents' other challenges to the administration of the marketing order for California almonds, which concerned the procedures by which assessments were imposed under the order (App. 70a-79a); the reserve requirements used to stabilize the volume of almonds marketed (App. 79a-93a); and the administrative procedure for challenging the order (App. 93a-94a).

mental interest in "stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry." App. 62a.

The Ninth Circuit held, however, that the almond program did not satisfy the second part of the *Central Hudson* test, because, in the court's view, it did not "directly advance" the underlying governmental interest. The court believed that, to establish that the creditable advertising portion of the program satisfied the "directly advances" requirement, the government had to show "both that the advertising for which credit is *granted* is *better* at selling almonds than the Board's own efforts *and* that the advertising for which credit is *denied* is *worse* at selling almonds than the Board's own efforts." App. 62a-63a. The court determined that the government had not made that showing. App. 64a-67a. The court considered it "a more difficult question" whether the "entire assessment-funded almond promotion program" (as distinguished from the creditable advertising provisions viewed in isolation) directly advanced the government's interest in promoting almond consumption. App. 67a. The court ultimately decided that question against the government, however, holding that the government had not shown that advertising conducted under the program was more effective in promoting almond consumption than advertising by individual handlers would be. App. 67a-68a.

The court of appeals also held that the program failed the third part of the *Central Hudson* test, because it was more extensive than necessary to further the governmental interest. App. 69a-70a. The court based that holding in part on its determination

that the government had not justified certain restrictions in the creditable advertising regulation. App. 69a.

The court of appeals remanded the case to the district court for further proceedings on the appropriate remedy. App. 94a-95a.

3. The Ninth Circuit issued its decision on respondents' First Amendment challenge in December 1993. In August 1993, while the case was under submission to the Ninth Circuit, the Secretary promulgated an interim final rule proposing revisions to the creditable advertising regulation in the almond marketing order. 58 Fed. Reg. 43,500. Several of the proposed revisions concerned restrictions on the types of advertising by individual almond handlers for which credit was available. See *id.* at 43,501-43,503. Because the Ninth Circuit had based its decision in part on the restrictions as to which the Secretary was considering revisions, the Secretary did not at that time petition this Court for a writ of certiorari to review the Ninth Circuit's judgment on the First Amendment issue.

In January 1994, the Secretary reopened the period for comments on the proposed revisions to the creditable advertising regulation. 59 Fed. Reg. 4247. In particular, the Secretary invited comments on the potential effect of the Ninth Circuit's decision on the creditable advertising regulation. *Id.* at 4248. The Secretary adopted a final rule revising the creditable advertising regulation in July 1994. *Id.* at 35,222. The revisions, *inter alia*, eliminate many of the former restrictions on the types of advertising for which an individual handler may receive credit against its assessment. See *id.* at 35,226-35,227.

4. On remand in the present case, the district court ordered the government to pay respondents approximately $4.3 million, which consisted of (1) $1.8 million in assessments that respondents had paid to the Almond Board or into a court escrow account; and (2) $2.5 million that respondents had paid third parties for creditable advertising. App. 43a-48a.

The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-17a. It reversed the order requiring the government to reimburse respondents for their expenditures on creditable advertising, holding that their claim for a monetary award was barred by sovereign immunity. App. 4a-9a. The court of appeals affirmed the district court's refusal to reduce the amount of the refund to take into account the benefit that respondents had received from the generic advertising purchased with their assessments. App. 9a-13a.[6]

5. In a subsequent Ninth Circuit case, handlers of California peaches, nectarines, and plums, relying on the Ninth Circuit's initial decision in this case, brought a First Amendment challenge to the generic advertising programs established under the AMAA marketing orders for those commodities. The Ninth Circuit sustained the challenge, finding it "largely governed by *Cal-Almond*." See *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367, 1377 (1995). The Secretary has filed a petition for a writ of certiorari to review the Ninth Circuit's ruling on the First Amendment issue in *Wileman Bros.*, petition for cert. pending, No. 95-1184 (filed Jan. 24, 1996).

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[6] The court of appeals subsequently denied respondents' petition for rehearing and rejected their suggestion of rehearing en banc. App. 474a-475a.

REASONS FOR GRANTING THE PETITION

1. In both this case and *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367 (1995), the Ninth Circuit sustained First Amendment challenges to generic advertising programs administered under marketing orders issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* Those rulings warrant review by this Court for the reasons set forth in the Secretary's petition for a writ of certiorari in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, petition for cert. pending, No. 95-1184 (filed Jan. 24, 1996).[7]

2. We believe that *Wileman Bros.* provides a more appropriate vehicle for review of the First Amendment issue than does this case. We therefore suggest that the Court hold the petition in this case for disposition in light of the Court's disposition of the Secretary's petition in *Wileman Bros.*

As explained above, the Ninth Circuit's decision on the First Amendment issue in this case turned in part on certain aspects of the creditable advertising regulation then in effect. In particular, the court determined that the regulation was overly restrictive with respect to the types of advertising for which handlers could receive credit.[8] That determination, in

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[7] We have provided respondents with a copy of the petition and reply brief filed by the Secretary in *Wileman Bros.*, as well as a copy of the Secretary's supplemental brief in that case informing the Court of the recent enactment of certain statutory provisions concerning generic advertising under marketing orders.

[8] App. 62a-63a (government was required, but failed, to show "both that the advertising for which credit is *granted* is *better* at selling almonds than the Board's own efforts *and* that the advertising for which credit is *denied* is *worse* at selling

turn, was based in part on the court's views as to certain features of the almond market, such as distribution patterns and end uses for almonds.[9] The court's determination that the creditable advertising regulation was overly restrictive, in light of the manner in which almonds were marketed, affected the court's analysis of the generic advertising program under both the "directly advances" and the "no more extensive than necessary" parts of the *Central Hudson* test.[10]

In its subsequent decision in *Wileman Bros.*, the Ninth Circuit made clear that its decision in the present case was not to be limited to generic advertising programs that have the same restrictions on creditable advertising as were imposed under the generic advertising program for almonds and that concern commodities for which the market is similar to that for almonds. Indeed, the Ninth Circuit in *Wileman Bros.* relied on its *Cal-Almond* decision at every step of its analysis.[11] Thus, the Ninth Circuit's

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almonds than the Board's own efforts"), 69a ("USDA offers *no* justifications for the restrictions that *deny* credit for certain advertisements").

[9] App. 65a (emphasis omitted) (creditable advertising restrictions "hinder[ed]" efforts of certain handlers by withholding credit for advertising cereal or ice cream containing California almonds and for advertising directing consumers to retail stores not operated by handlers), 66a-67a (creditable advertising regulation favored Blue Diamond Inc. because of its dominance of domestic retail market for almonds).

[10] App. 64a ("USDA * * * cannot show that the creditable advertising regulations 'directly advance' the government's interest"), 70a ("The creditable advertising regulations * * * are more extensive than necessary.").

[11] 58 F.3d at 1377 (First Amendment analysis of generic advertising programs for California peaches, nectarines, and

decision on the First Amendment issue in this case warrants invoking this Court's jurisdiction, for the same reason as does the Ninth Circuit's decision on that issue in *Wileman Bros.*

In our view, however, the Ninth Circuit's reliance in this case on the former creditable advertising regulation in the marketing order for California almonds and on certain features of the market for California almonds makes this case a less appropriate vehicle for plenary review of the First Amendment issue than is the *Wileman Bros.* decision. For one thing, the Secretary has made no provision for creditable advertising in most of the AMAA marketing orders that authorize generic promotion programs.[12] Moreover, the creditable advertising regulations that

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plums was "largely governed by" prior decision in *Cal-Almond*); see also *id.* at 1378 (relying on *Cal-Almond* to hold that generic advertising program should be reviewed under *Central Hudson* test and that programs at issue satisfied the first part of the test because they promoted "substantial" governmental interest), 1378-1379 (holding that programs did not satisfy the "directly advances" part of the *Central Hudson* test, based in part on determination that "[t]he same state of affairs" obtained in marketing of peaches, nectarines, and plums as obtained in marketing of almonds), 1380 (relying on *Cal-Almond* in holding that programs at issue were more extensive than necessary to serve governmental interest).

[12] Under 7 U.S.C. 608c(6)(I), the Secretary is specifically authorized (but not required) to allow credits for individually purchased advertising by handlers of almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit. The absence of specific authorization for such credits under other generic advertising programs may imply the absence of authorization. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). In any event, the Secretary has not provided for creditable advertising in connection with other commodities for which he has issued marketing orders under the AMAA.

are included in other marketing orders vary both from one another and from the creditable advertising regulation for California almonds that was reviewed below. See 7 C.F.R. 932.45(a)(2) (olives grown in California), 982.58(b) (filberts/hazelnuts grown in Oregon and Washington), and 989.53(b) (raisins produced from grapes grown in California). Finally, as explained above, the creditable advertising regulation for California almonds has itself been revised significantly since the first court of appeals decision below was issued. See p. 11, *supra*.

Although the First Amendment issue presented here and in *Wileman Bros.* warrants review by this Court, there is no continuing importance to the manner in which the First Amendment applies to the particulars of the former creditable advertising regulation in the marketing order for California almonds. Furthermore, to the extent that this Court's resolution of the First Amendment issue in this case might turn upon the particulars of the former regulation, the Court's decision could leave uncertainty regarding the validity of numerous other statutorily created generic advertising programs that make no provision or different provision for creditable advertising. Accordingly, *Wileman Bros.* provides a more appropriate vehicle for resolution of the First Amendment issue than does this case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition for a writ of certiorari in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184 (filed Jan. 24, 1996).

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys

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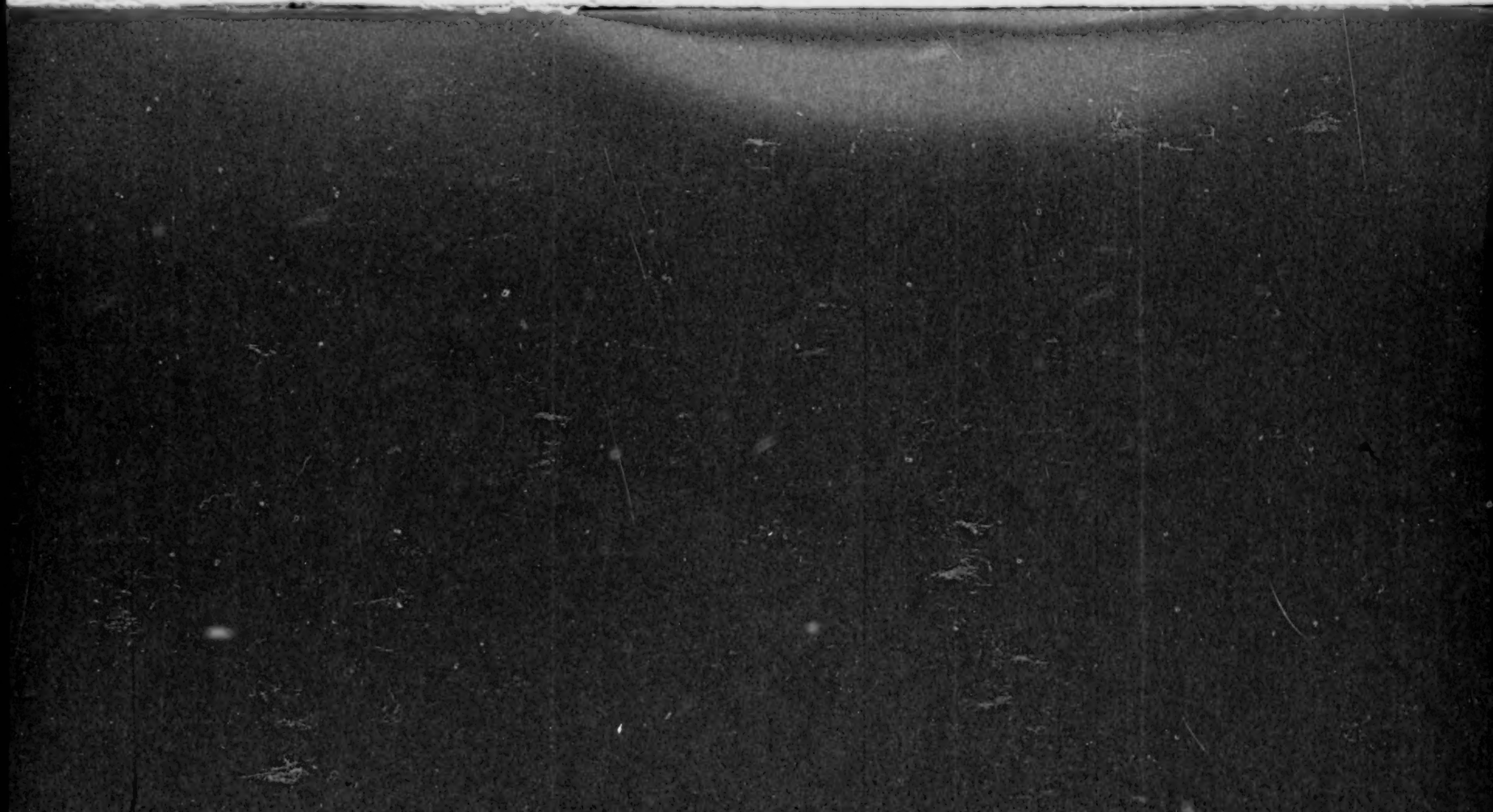
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
RICHARD H. SEAMON
Assistant to the Solicitor General
BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217



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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 94-17160, 94-17163, 94-17164, 94-17166,
94-17167 and 94-17182

CAL-ALMOND, INC., A CALIFORNIA CORPORATION;
SAULSBURY ORCHARD AND ALMOND
PROCESSING INC.; CARLSON FARMS, A SOLE
PROPRIETORSHIP, PLAINTIFFS-APPELLEES

v.

DEPARTMENT OF AGRICULTURE,
DEFENDANT-APPELLANT

Argued and Submitted May 11, 1995
Decided Oct. 10, 1995

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

In a previous appeal for these cases, we held that certain provisions of the California Almond Marketing Order (Order), 7 C.F.R. § 981, violated the free speech and free association rights of several almond handlers. *Cal-Almond, Inc. v. Department of Agriculture*, 14 F.3d 429 (9th Cir.1993) (*Cal-Almond I*). We remanded the case to the district court to conduct the fact-intensive inquiry necessary to determine the appropriate remedy. On remand, the district court

ordered the United States Department of Agriculture (USDA) to refund the full amount the almond handlers had paid to the Board since 1980, to release all of the advertising assessments that had been placed in escrow accounts, and to reimburse the almond handlers all of the money they spent on creditable advertising. The USDA appeals the propriety of the district court's award. We have jurisdiction, *see* 28 U.S.C. § 1291, and we affirm in part and reverse in part.

I.

In our previous opinion, we held that certain provisions of the Order, which was issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601-674 (AMAA), to regulate the California almond-handling industry, violated the almond handlers' free speech and free association rights. *Id.* at 440. Specifically, we examined the Order's provisions that required almond handlers to contribute to a generic pro-almond public relations, advertising, and promotion program (Program). The Program, administered by the California Almond Board (Board), was funded by assessments collected from almond handlers on the basis of the volume of almonds handled. 7 C.F.R. §§ 981.41(a), 981.81(a). The assessments could be reduced, at least in part, by the amount a handler spent on creditable advertising and other promotional activities as provided in 7 C.F.R. § 981.441(d)(1)(i)-(iii). In order to be approved by the Board, the promotional activity had to have as its "clear and evident purpose" the promotion of "the sale, consumption, or use of California almonds." 7 C.F.R. § 981.441(e)(2).

In *Cal-Almond I*, we held that the Board's assessments implicated the almond handlers' First Amendment rights because the handlers, who constitute a "publicly identified group," were forced to fund the "'dissemination of a particular message associated with that group.'" *Cal-Almond I*, 14 F.3d at 435 (quoting *United States v. Frame*, 885 F.2d 1119, 1132 (3rd Cir.1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990)). We found that the assessments implicated the handlers' rights to free speech and free association, regardless of whether the assessments were paid directly to the Board or satisfied by expenditures on creditable advertising and promotional activities. *Id.* Applying the three prong test from *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we concluded that the Almond Marketing Program violated the handlers' First Amendment rights. *Cal-Almond I*, 14 F.3d at 440. Consequently, we remanded to the district court the fact-intensive determination of the appropriate remedy. *Id.* at 449.

On remand, the parties stipulated regarding the various amounts that each handler paid to the Board for creditable advertising, that had been placed in escrow for payment of creditable advertising assessments, that had been paid to third parties (*i.e.*, newspapers, magazines, etc.) for creditable advertising, and the portion of each handler's annual assessments that was applied toward the Board's generic promotional activities. The district court ordered the USDA to refund approximately $135,000, which represents the full amount handlers paid to the Board since 1980, to release approximately $1.7 million of

advertising assessments that had been placed in escrow accounts, and to reimburse the $2.5 million that they had paid third parties for creditable advertising. The USDA timely appeals this order.

II.

We first address whether the doctrine of sovereign immunity bars the reimbursement of money the handlers spent on creditable advertising ordered by the district court.[1] We review questions involving principles of sovereign immunity de novo. *United States v. Woodley*, 9 F.3d 774, 781 (9th Cir.1993).

It is well established that "[i]n a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity. . . ." *United States v. Testan*, 424 U.S. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976). It is also clear that waivers of sovereign immunity must be "unequivocally expressed." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 112 S.Ct. 1011, 1014, 117 L.Ed.2d 181 (1992). Claims for specific relief, however, are not subject to sovereign immunity. *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir.1983). The question we must decide, therefore, is whether reimbursement of the money that the handlers paid for creditable advertising is best characterized as damages, and thus barred by the doctrine of sovereign immunity, or as specific relief.

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[1] The USDA does not, and indeed could not, contend that refund of assessments paid to the Board would be damages and therefore barred by sovereign immunity. *See Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1386 (9th Cir.1995).

The distinction between money damages and specific monetary relief is that "[d]amages are given to the plaintiff to *substitute* for a suffered loss. . . . specific remedies 'are not *substitute* remedies at all, but attempt to give the plaintiff the very thing to which he is entitled.'" *Maryland Dep't of Human Resources v. Department of HHS*, 763 F.2d 1441, 1446 (D.C.Cir.1985) (quoting D. Dobbs, Handbook on the Law of Remedies 135 (1973)); *see also Bowen v. Massachusetts*, 487 U.S. 879, 914, 108 S.Ct. 2722, 2742, 101 L.Ed.2d 749 (Scalia, J., dissenting) ("Whereas damages compensate a plaintiff for a loss, specific relief prevents or undoes the loss—for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken. . . .").

Requiring the USDA to reimburse the handlers for money they expended on creditable advertising would oblige the USDA to "substitute" money from its coffers for money the handlers had paid to third parties. Unlike the assessments paid directly to the Board, in the situation of the money paid for creditable advertising, the USDA cannot return the "precise property wrongfully taken" because that money was not paid to the USDA. Reimbursement for the money handlers spent on creditable advertising would therefore constitute damages. Since nothing in the Act demonstrates congressional intent to waive sovereign immunity for the claims raised by the handlers, *see Wileman*, 58 F.3d at 1385, the handlers' claims for reimbursement for money spent on creditable advertising are barred by sovereign immunity.

The handlers cite several cases in which monetary remediation was not barred by sovereign immunity,

arguing that those cases compel the conclusion that reimbursement in this case would not constitute damages. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 910, 108 S.Ct. 2722, 2740, 101 L.Ed.2d 749 (1988); *Katz v. Cisneros*, 16 F.3d 1204, 1208 (Fed.Cir.1994); *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 797 (Fed.Cir.1993); *Zellous v. Broadhead Assoc.*, 906 F.2d 94 (3d Cir.1990). In those cases, however, the monetary awards were made to plaintiffs because they were statutorily entitled to amounts that had been wrongfully withheld, not to reimburse them for money spent. For example, in *Zellous*—the case primarily relied upon by the handlers and the district court—plaintiffs were tenants of a housing project whose rent was subsidized under federal law. *Zellous*, 906 F.2d at 95. The tenants claimed that the Department of Housing and Urban Development (HUD), together with the housing project's owners and managers, violated the Housing Act and associated federal regulations as well as the Administrative Procedure Act (APA) by failing to make timely adjustments in their utilities allowance. *Id.* As a consequence of these violations, the tenants did not receive from HUD money to which they were entitled under the Housing Act and they paid more in rent than they should have. *Id.*

At first glance, *Zellous* and the other cases on which the handlers rely, appear to resemble the situation in this case. Like this case, plaintiffs in *Zellous* paid money to third parties (*i.e.*, private landlords). However, the plaintiffs in *Zellous* were not compensated for the money they were wrongfully forced to pay in excess rent. Instead, the court in *Zellous* " 'merely require[d] [HUD] to belatedly pay

expenses that it should have paid all along and would have borne in the first instance had it [implemented timely utility allowance adjustments.]'" *Id.* at 99 (second and third alterations in original) (internal quotation marks omitted).

It is true the amount the *Zellous* plaintiffs paid to the landlords was equal to the amount wrongfully withheld, but that fact does not blur the distinction between the different theories of recovery. Had the plaintiffs in *Zellous* framed their request for relief as seeking recovery of money wrongfully paid, their recovery would have been barred by sovereign immunity. They avoided this problem by instead framing their claim as one seeking to have the government pay them money to which they were statutorily entitled. The coincidence that the two amounts (the amount of excess rent paid and the amount owed to plaintiffs by HUD) were the same does not change the fact that the *Zellous* plaintiffs had a separate remedial theory that did not seek compensation for money they paid in excess rent. The availability of an alternative remedial theory allowed them to avoid the roadblock that sovereign immunity otherwise would have presented. By contrast, no alternative theory exists in this case to entitle the handlers to recover moneys spent on creditable advertising.

The almond handlers also argue that the doctrine of the law of the case precludes us from addressing the appropriateness of the district court's order requiring reimbursement of money spent on creditable advertising. The law of the case doctrine requires that a decision rendered by an appellate court on a legal issue be followed in all subsequent proceedings

in the same case. *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir.1985), *cert. denied*, 475 U.S. 1064, 106 S.Ct. 1374, 89 L.Ed.2d 601 (1986). The almond handlers urge that we implicitly contemplated the reimbursement of the $2.5 million spent on creditable advertising in our decision in *Cal-Almond I*, and are therefore precluded from reconsidering it. To buttress their argument, the almond handlers point out that in *Cal-Almond I*, we found that the Order was unconstitutional regardless of whether the handlers made direct payment to the Board or expended money on pre-approved advertising. This argument confuses the distinction between right and remedy.

In *Cal-Almond I*, we defined the First Amendment rights infringed by the Program. For the purpose of that analysis, it did not matter to whom the money was paid; it only mattered that the payments were coercive and required the handlers to fund dissemination of a particular message. However, when analyzing what remedies are available, it matters a great deal whether the recovery would require the USDA to reimburse the handlers for money they paid to third parties because of the doctrine of sovereign immunity.

Our analysis regarding sovereign immunity leads us to a somewhat awkward result: although the handlers' compelled expenditures on creditable advertising violated their First Amendment rights, there is no individual remediation available for those violations. Despite the celebrated dictum in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), in the law of modern constitutional remedies, not every right comes equipped with a guarantee of individual remediation for every violation of that

right. As this case demonstrates, the doctrine of sovereign immunity provides a formidable limitation on the availability of individual remedies. While it is "[d]ecried as irrational and immoral by some, . . . criticized on historic grounds by others, . . . recognized by all to have little doctrinal coherence, the doctrine of sovereign immunity nonetheless retained the endorsement of the two institutions that matter—the Supreme Court and Congress." *Interfirst Bank of Dallas, N.A. v. United States*, 769 F.2d 299, 303 (5th Cir.1985), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1458, 89 L.Ed.2d 716 (1986). Under the doctrine of sovereign immunity, we are compelled to conclude that the handlers' claims for reimbursement of the amounts they were wrongfully compelled to pay for creditable advertising is a right for which there is no individual remedy.

III.

We now turn to the USDA's argument that any refund to the almond handlers must be offset or reduced by the amount of benefit the handlers received from the Board's activities.

As a primary matter, the almond handlers assert that the USDA either waived, or should be estopped from asserting, its claim for offset of the refund. The almond handlers argue that the USDA waived its argument regarding offset because it did not raise the issue until we remanded the case for determination of the remedies. However, it was not until our remand that the specifics of fashioning remedial relief came into focus. The USDA did not waive its opportunity to raise the issue of offset by letting the determination of remedies occur without it. For this reason, the cases relied on by the handlers are distinguish-

able. In both *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089 (D.C.Cir.1984), *cert. denied*, 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985), and *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250-51 (D.C.Cir.1987), defendants failed to raise objections to courts' remedial determinations at the time those determinations were being made. In this case, the USDA did not waive its opportunity to raise the issue of offset.

Nor is it precluded by the doctrine of judicial estoppel. Judicial estoppel "'is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.'" *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir.1989) (quoting *Religious Technology Ctr. v. Scott*, 869 F.2d 1306, 1311 (9th Cir.1989) (Hall, J., dissenting)), *cert. denied*, 501 U.S. 1260, 111 S.Ct. 2915, 115 L.Ed.2d 1078 (1991).

The almond handlers contend that the USDA previously conceded that the handlers would be entitled to receive a full refund if the assessments were found to have been wrongfully imposed. In support, the handlers refer us to the USDA brief for *Cal-Almond I*, in which the USDA stated, "[T]he AMAA, through its provisions for judicial review, provides handlers with an opportunity to recoup assessments found to have been wrongfully imposed." The almond handlers also cite the USDA's cross-motion for summary judgment in the original proceeding before the district court, in which the USDA stated, "The AMAA . . . provides handlers with an opportunity to recoup assessments found to have been wrongfully imposed." The handlers over-

state the USDA's concessions. These statements merely indicate that the USDA acknowledges that a refund is available for wrongfully imposed assessments, not an admission that the handlers are entitled to a full refund. The USDA cannot be judicially estopped from arguing against a full refund.

The handlers' primary contention is that the law of the case precludes us from reviewing the question of whether the handlers' refund from the Board should be reduced. Whether an appellate court previously decided an issue of law, precluding the district court from reconsidering the same issue, is a mixed question of fact and law in which legal questions predominate. *Cf. United States v. Geophysical Corp.*, 732 F.2d 693, 697 (9th Cir.1984). A mixed question of law and fact in which legal issues predominate is reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. (en banc)), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

The USDA contends that the law of the case doctrine does not preclude consideration of this issue because *Cal-Almond I* acknowledged that plaintiffs received some benefit from the unconstitutionally compelled advertising. Our prior acknowledgment that the handlers received some benefit from the coerced advertising, the USDA contends, implies that we did not intend for the handlers to be refunded all of the money they paid to the Board. This time it is the USDA who confuses right and remedy.

In applying the *Central Hudson* balancing test to determine whether the almond handlers' First Amendment right was violated, we weighed the benefit handlers derived from the coercive advertising. *Cal-Almond I*, 14 F.3d at 437-38. Once we applied

the balancing test and determined that the assessments failed the balancing, however, we concluded that the *entire* amount of assessments spent in advertising were unconstitutional, not merely the portion that failed to advance the handlers' efforts to sell their almonds. *Id.* at 438. In other words, our consideration of the benefit to the handlers was for the purposes of analyzing the right, not the remedy.

In *Cal-Almond I*, we decided that "a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due." *Id.* at 448. Our decision was simply an application of existing law. "[T]his court, on several occasions, has suggested that a refund of improper assessments is the appropriate remedy for prevailing handlers." *Wileman*, 58 F.3d at 1385 (citing *Cal-Almond I*, 14 F.3d at 448; *Riverbend Farms*, 847 F.2d at 559; *Navel Orange Admin. Comm.*, 722 F.2d at 452).

Despite the well established law in this area, and our reliance on it in *Cal-Almond I*, the USDA attempts to have us consider the benefit to the handlers with respect to remedies by proffering a very novel argument. The USDA contends that unless we discount the handlers' refund by the amount by which they benefitted by the Board's unconstitutional conduct, they will be unjustly enriched. However, the USDA cannot point to, nor can we find, any case in which the theory of unjust enrichment has been relied upon in fashioning a constitutional remedy. The fact that the assessments may have conferred some benefit on the handlers does not change the fact that the entire amount of the assessments used for advertising was improper and, as we held in

Cal-Almond I, that the handlers are entitled to refund of any improper assessments.

IV.

The USDA's final argument is that the district court erred by refusing to remand to the Secretary for creation of a supplemental administrative record. The USDA asserts that a remand is required by the AMAA, or in the alternative, by the doctrine of primary jurisdiction.

We review the district court's interpretation of the AMAA de novo. *See cf.* [*sic*] *Abedini v. INS*, 971 F.2d 188, 190-91 (9th Cir.1992) (reviewing de novo the deter-mination of purely legal questions regarding statu-tory requirements).

"Congress has provided a special procedure for ascertaining whether [a marketing] order is or is not in accordance with the law." *United States v. Ruzicka*, 329 U.S. 287, 294, 67 S.Ct. 207, 210, 91 L.Ed. 290 (1946). The AMAA gives handlers of agricultural commodities the express right to seek administrative review of "any [marketing] order or a provision of such order or any obligation imposed in connection therewith." 7 U.S.C. § 608c(15)(A). A handler contending that such a provision is "not in accordance with law" is entitled to a hearing on that question before the agency and a ruling by the Secretary, *id.*, and the remedy must be sought from the Secretary in the first instance. *Ruzicka*, 329 U.S. at 294, 67 S.Ct. at 210. The Secretary's final ruling is then reviewable by a district court. 7 U.S.C. § 608c(15)(B). "If the court determines that [a] ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions

either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." *Id.*

This scheme has been complied with in this case. The handlers filed administrative petitions pursuant to 7 U.S.C. § 608c(15)(A). *Cal-Almond I*, 14 F.3d at 434. Following hearings, USDA administrative law judges issued decisions, which were appealed to USDA Judicial Officers. After the Judicial Officers rendered their decisions, the handlers brought their claims to the district court. This is all the Act requires.

The USDA nevertheless contends that the district court erred by refusing to remand to the Secretary for creation of a supplemental administrative record. There is no reason to remand to the USDA for determination of the scope of the remedy. To the contrary, we have held on numerous occasions, including the prior appeal in this case, that an appropriate remedy for handlers who prevail in their administrative petitions is a refund of assessments wrongfully paid. *See Cal-Almond I*, 14 F.3d at 448; *United States v. Riverbend Farms*, 847 F.2d 553, 559 (9th Cir.1988) ("If the Secretary or courts (upon proper appeal) substantiated the challenge, the handler would be entitled to a refund."). The parties here stipulated regarding all relevant amounts. Since a determination of the remedy flows directly from our decision in *Cal-Almond I* and the parties' stipulation, there is no need to remand to the Secretary. The district court did not err by declining to remand the issue of remedies to the Secretary.

In the alternative, the USDA argues that the doctrine of primary jurisdiction requires a remand. The doctrine of primary jurisdiction allows courts to exercise their discretion to route certain issues for a threshold decision to the supervising agency of a particular industry. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir.1987). Four common factors are considered when determining whether to invoke the doctrine of primary jurisdiction: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." *Id.* at 1362.

It is true that "Congress channeled disputes concerning marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270 (1984). However, the remedies in this case do not involve "technical questions of fact uniquely within the expertise and experience of [the USDA]. . . ." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643 (1976), *superseded by statute (on another ground) as stated in, Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 926, 111 S.Ct. 307, 112 L.Ed.2d 261 (1990). Nor do they require complicated calculations that require the expertise of the Secretary. We therefore find that the district

court did not abuse its discretion by declining to invoke the doctrine of primary jurisdiction.

V.

Before closing, we note that a wide cross-section of the almond industry, including other handlers not directly involved in this appeal ("Amici"), filed an amicus brief requesting that we not only determine the scope of the remedies to which the handlers are entitled, but also the means by which the USDA should satisfy the judgment. Amici argue that the appropriate source from which the judgment against the USDA should be satisfied is the Judgment Fund, pursuant to 28 U.S.C. § 2414. Amici contend that if the judgment is satisfied either by imposing a supplemental assessment on the industry or by taking money from the reserve fund created pursuant to 7 C.F.R. § 981.81(c), their First and Fifth Amendment rights would be violated. None of Amici's constitutional claims are ripe and we therefore do not consider them.

Although we have held that remand to the Secretary is unnecessary for determination of the scope of the remedy, it is the province of the USDA to determine how a judgment against it should be satisfied. Certainly if Amici believe that the USDA has chosen an unconstitutional method, Amici can challenge this action before the USDA.

VI.

The handlers request an award of attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. Attorney's fees are not appropriate in this case because, even though it did not prevail on all of its claims, the USDA brought a justified appeal from the district court's decision. We also find that the handlers are not entitled to post-judgment interest pursuant to 28 U.S.C. § 1961.

VII.

The district court's decision that the USDA refund the full amount the almond handlers had paid to the Board since 1980 is affirmed. There is no offset for the Board's claim of unjust enrichment. The almond handlers have a right to reimbursement for payment to third parties for creditable advertising, but there is no individual remedy for these violations. Therefore, the district court's decision that the USDA reimburse the $2.5 million that had been paid to third parties for creditable advertising is reversed. We affirm the district court's refusal to remand the issue of remedies to the Secretary for supplemental administrative record, or failure to invoke the doctrine of primary jurisdiction.

AFFIRMED in part, REVERSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-91-122 REC

CAL-ALMOND, INC., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

[Filed: Sept. 6, 1994]

ORDER RE PLAINTIFF'S POST-REMAND MOTION FOR REFUND AND DEFENDANT'S MOTION FOR REMAND

On July 18, 1994 the court heard plaintiffs' respective Post-Remand Motions for Refund of Almond Board Assessments and defendant's respective Motions for Remand.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court issues its orders with respect to these motions as and for the reasons set forth herein.

A. Background

The Ninth Circuit, in *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429, 433-440 (9th Cir. 1993), held that the Almond Marketing Program described in the pertinent provisions of the Almond Marketing Order violated the First Amendment,

thereby reversing this court's decision in factor of the U.S.D.A. on this issue. However, the Ninth Circuit affirmed this court's rulings rejecting other challenges made by plaintiffs to the Almond Marketing Order and its implementation. *Id.* at 440-449. The Ninth Circuit then concluded:

> We are now faced with the question of what remedy to grant to appellants. Appellants request a full refund of the assessments imposed upon them from 1980 to the present, as well as attorneys' fees and costs pursuant to the Equal Access to Justice Act ('EAJA'), 28 U.S.C. § 2412. Because of the fact-intensive nature of the inquiry, we find that '[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court.' *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 . . . (1986). *See also Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 . . . (1984). The case is remanded for further proceedings consistent with this opinion.

Id. at 449.

B. Refund of Assessments

Plaintiffs now move the court to refund to plaintiffs the creditable advertising assessment imposed on each of the respective plaintiffs for the years at issue with respect to each plaintiff and to refund to plaintiffs that percentage of the annual assessment for the years at issue attributable to the advertising and promotion budget for that year. In addition, plaintiffs seek interest on the refunded amounts at the rate of 5% per annum. Plaintiffs essentially take the position that resolution of the remand is a simple

matter of accounting. * * * The Department argues that certain components of the recovery sought by plaintiffs are barred by the doctrine of sovereign immunity, that others should be determined in the first instance by administrative proceedings, and/or that the court must conduct an evidentiary hearing to determine the total amount of any refund to be paid to plaintiffs.

A. Sovereign Immunity.

1. Creditable Advertising Amounts.

A portion of the monies that plaintiffs now seek to have refunded to them by the Department are amounts that plaintiffs spent on advertising through the creditable advertising provisions (as opposed to amounts turned over to the Almond Marketing Board as assessments a portion of which was spend [*sic*] by the Almond Marketing Board on advertising).[1]

Although recognizing that a return of assessments does not necessarily implicate sovereign immunity, the Department argues that a request to be compensated for sums previously spent but not remitted to the government constitutes a request for money damages which is barred by sovereign immunity. In

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[1] The Almond Marketing Order provided that handlers' assessments collected from handlers based on the volume of almonds they handle could be reduced by the amount that a handler spends on authorized advertising. Before a handler could receive credit for his marketing promotion expenditures, the California Almond Board must have determined that such expenditures meet the requirements of the creditable advertising regulations.

so arguing, the Department cites *Bowen v. Massachusetts*, 487 U.S. 895 (1988).

In *Bowen*, the United States Supreme Court construed Section 702 of the Administrative Procedure Act as not foreclosing judicial review of an action brought by a state challenging a disallowance order under the Medicaid provisions. In so ruling, the Supreme Court stated in pertinent part as follows:

> Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with back pay, or for 'the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.' . . . The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'

487 U.S. at 893.

Bowen cited with approval its decision in *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985). In *Burlington*, the Supreme Court held that relief that ordered a town to reimburse parents for educational costs that Congress intended the town to pay is not "damages", stating in pertinent part as follows:

> In this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.

Burlington, 471 U.S. at 370-371.

In addition, *Bowen* cited *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (D.D.C. 1985), wherein it was stated in pertinent part as follows:

> We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' . . . Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' . . .

The Ninth Circuit has suggested that the remedy to a handler who successfully challenges a marketing order or its implementation is the "refund of any paid assessments found not to have been due . . . ." *See Saulsbury Orchards & Almond Processing v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 559

(9th Cir. 1988); *Naval Orange Admin. Committee v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983).[2]

The Department argues, however, that this suggestion cannot be applied here because, for those years in which the plaintiffs spent amounts equivalent to what their creditable advertising assessments would have been, those portions of the assessments never in fact became due and were never actually tendered to the Board.

Plaintiffs argue that the Department's position ignores the conclusion by the Ninth Circuit that the creditable advertising regulations violated the First Amendment because, among other things, "if handlers do not advertise according to the regulations, they must contribute their assessment to the Board, which is itself a type of compulsion implicating Appellants' First Amendment rights." 14 F.3d at 435-436. Plaintiffs further assert that the Department's argument that amounts spent pursuant to the creditable advertising regulations never became due begs the question. Because the assessments became obligations of the handlers when announced by the Secretary each crop year, the Almond Marketing Order and its regulations forced the plaintiffs into a choice of either paying that portion of the assessment attributable to advertising to the Board or to spend some portion of assessment on advertising which had to be approved by the Board in order to obtain a credit toward the annual assessment.

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[2] These cases do not hold that this is the exclusive remedy. The cases were rejecting various arguments attempting to get around the application of *United States v. Ruzicka*, 329 U.S. 287 (1946).

In this regard, plaintiffs refer the court to *Zellous v. Broadhead Associates*, 906 F.2d 94 (3d Cir. 1990). In *Zellous*, the plaintiffs were former, present and prospective tenants of a housing project whose rent was subsidized under federal law. * * * The tenants contended that HUD, together with the housing project's owners and managers, violated the Housing Act and associated federal regulations as well as the APA by failing to make timely adjustments in their utilities allowance. This caused the tenants to pay a higher share of their income as rent than was permitted under the Brooke Amendment, which places a cap on the total of rent plus utilities for which tenants are responsible. In their complaint, the tenants requested "declaratory, injunctive and monetary relief or in the alternative restitution." The tenants contended that the retrospective aspect of this relief should require HUD reimbursement for the rent they paid beyond that which would have been due if the utilities allowance had been set higher. The Third Circuit rejected the claim that this requested relief constituted a request for money damages. In so doing, the Third Circuit stated in pertinent part as follows:

> We recognize that in *Bowen*, the plaintiff state sought specific relief under a statute that maintains direct payment to the state of a percentage of its Medicaid expenses . . . Here, neither section 8 nor the Brooke Amendment mandates direct payments to the plaintiff tenants. Instead, the tenants rental obligations is reduced through a system of government subsidies to property owners. We do not believe that this scheme of in-

direct support for tenants transforms the character of the requested reimbursement as damages.

It appears that *Zellous*, although not exactly on point, does support the plaintiffs' position that what they seek are not money damages, but reimbursement for monies wrongfully expended pursuant to a government program. However, although it may be semantics, there may be a difference between the term refund and the term reimbursement. The fact that the monies at issue were not actually paid to the Board but were actually spent by plaintiffs implies that the concept at issue is one of reimbursement. In this regard, although plaintiffs focus on the term "due" when speaking of refunded assessments, it must be noted that the Ninth Circuit cases upon which plaintiffs rely actually use the phrase "refund of any *paid* assessments found not to have been due . . ."

The court finds this to be a difficult question to resolve. Upon reflection, however, the court concludes that the refund or reimbursement of the creditable advertising amounts is not barred by sovereign immunity on the ground that the amounts represent money damages. The court is persuaded that the refund or reimbursement of these amounts is part of an equitable remedy designed to give to these plaintiffs what the Ninth Circuit has held they were entitled to because of the violation of the First Amendment. As noted by plaintiffs, they would not have spent this money were it not for the fact that both aspects of the advertising provisions of the Almond Marketing Order were unconstitutional.

2. Prejudgment Interest.

Plaintiffs assert that the court should award them prejudgment interest at the rate of 5% on those assessments to be refunded to plaintiffs which have not already been placed by plaintiffs in escrow accounts.

However, an award of interest against the United States is barred by the doctrine of sovereign immunity. As reiterated in *Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986):

> In cases not in the Court of Claims, this Court has reaffirmed the notion: 'Apart from constitutional requirements, in the absence of specific provision by statute, or "express consent . . . by Congress," interest does not run on a claim against the United States.'

The Supreme Court further explains the qualification of "constitutional requirements":

> The 'constitutional requirement' arises in a taking under the Fifth Amendment. To satisfy the constitutional mandate, 'just compensation' includes a payment for interest . . . The no-interest rule is similarly inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise . . . .

Id. at 317 n.5.

Plaintiffs argue that this doctrine does not apply in cases involving First Amendment violations. However, plaintiffs cite no cases in support of this contention and the court could [*sic*] locate any in its

research. The cases upon which plaintiffs rely in asserting that they are entitled to prejudgment interest in cases involving deductions from dues in violation of the First Amendment are cases involving non-governmental defendants. *See Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993).[3] Although in remanding this action to this court for further proceedings, the Ninth Circuit cited *Ellis*, it did so by a "*see* also" citation with no particular page reference. The Ninth Circuit also cited *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986). However, there is no suggestion in this citation that the court was to award prejudgment interest. Rather, the citation was to clarify that the determination of the appropriate remedy should be made in this court first because of the factual nature of the relevant inquiries.

Therefore, the court rules that plaintiffs are not entitled to prejudgment interest because of the doctrine of sovereign immunity.

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[3] In *Ellis*, the Supreme Court held that, to avoid forced subsidies forbidden by the First Amendment, unions must adopt procedures 'such as advance reduction of dues and/or interest-bearing escrow accounts.' 466 U.S. at 448.

B. Supplemental Fact Finding.[4]

The Department takes issue with plaintiffs' contentions that no further fact finding is permitted by the Ninth Circuit's opinion and the remand order. The Department argues that the determination of the appropriate remedy in this case will require an examination of several equitable considerations and important issues concerning the operation of the Order under the AMAA, many of which cannot be evaluated based on the present administrative record.

1. Motion to Remand.

If it is concluded that supplemental fact finding is required in order to determine the appropriate remedy, the Department argues that the court should remand this matter to the Department "to craft such a remedy consistent with the future operation of the Order under the AMAA, based on a supplemental

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[4] Plaintiffs repeatedly argue that the Department conceded in pleadings filed in the Ninth Circuit that plaintiffs would be entitled to a full refund of the advertising assessments should plaintiffs prevail on the First Amendment issue. The court concludes that plaintiffs are reading more into these briefs than was intended by the Department. Moreover, the court questions that a statement made in the course of briefing an issue which did not address the specifics of fashioning a remedy can be deemed to be a concession. Finally, the portion of the Department's brief set forth as Exhibit K to plaintiffs' reply brief merely quotes the Department's response to plaintiffs' appeal of this court's ruling that plaintiffs' due process rights were not violated by the length of the administrative and review proceedings. The Department merely was referring to the Ninth Circuit law rejected [*sic*] such challenges because of the provisions of the AMAA providing handlers with an opportunity to recoup assessments found to have been wrongfully imposed.

factual record created in an administrative proceeding and subject to judicial review of the award-determination by the Secretary."

a. AMAA.

The Department argues that such a remand is required by the statutory scheme of the AMAA and *United States v. Ruzicka*, 329 U.S. 287 (1946). Any challenge to the applicability of a marketing order must be made in the first instance administratively pursuant to section 8(c)(15) of the AMAA, 7 U.S.C. § 608(c)(15). *Ruzicka*, *id.* at 294; *Pescosolido v. Block*, 765 F.2d 827, 831 (9th Cir. 1985). The Department argues:

> Here, any determination of the amount of any award requires specialized knowledge of the industry and the effect of various types of advertising. Perhaps even more importantly, any decision as to how to fashion a remedy, given the bar of sovereign immunity for damages, will entail an assessment of how best to effectuate the purposes of the AMAA while complying with the Ninth Circuit's mandate. The requirement that judicial review of legal issues pertaining to the marketing order be limited to an administrative record should apply to situations such as this one where a new set of facts must be established and reviewed in order to determine the appropriate remedy for a successful legal challenge to a marketing order.

Section 608c(15)(B) does provide in pertinent that "[i]f the court determines that such a ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court

shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." However, the court does not read this provision to *require* that this court remand this matter to the Department for further administrative proceedings. Plaintiffs have already complied with the AMAA in bringing their challenges to the Almond Marketing Order. Plaintiffs have prevailed on the merits of two of their challenges. The Department cites no cases even suggesting that the AMAA requires that the remedy for a determined violation of law with respect to a marketing order must also be determined in the first instance by the Department. Absent specific case authority, this portion of the Department's motion to remand should be denied.

b. Primary Jurisdiction.

As an alternate basis for remanding this action to the Department to determine an appropriate remedy, the Department invokes the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction is explained in *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987):

> The doctrine of primary jurisdiction operates as follows: 'When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved.' . . . The doctrine applies when 'protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.'

> . . . Thus, it is the extent to which congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine . . . .
>
> There are four factors uniformly present in cases where the doctrine properly is invoked: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.

The Department asserts that each of these factors is satisfied here and that the court should remand.

Plaintiffs respond that the invocation of the primary jurisdiction doctrine is not appropriate or necessary to the resolution of the issues presently before this court.

The court is not persuaded that remand to the Department as an exercise of primary jurisdiction is necessary. It seems to the court that, assuming the amounts to be refunded or reimbursed to plaintiffs can be determined from the record already before the court, *see* discussion *infra*, the mechanics of making payment(s), although perhaps requiring some evidence from the Board, do not require any particular expertise of the Department.

2. Ability to Conduct Supplemental Fact Finding.

The parties dispute whether this court is permitted to conduct any supplemental fact finding by the terms of the Ninth Circuit's remand. Plaintiffs

take the position that the Ninth Circuit has already held that plaintiffs did not receive any benefit from the creditable advertising and the generic promotion programs.

The Department argues that not only did the Ninth Circuit's decision not preclude supplemental factual findings about the extent of the benefits enjoyed by the plaintiffs, but it expressly contemplated further factual findings. The Department takes the position that supplemental fact finding is required to determine the following issues:

> (1) the extent to which plaintiffs benefitted from the creditable advertising program;
>
> (2) the extent to which plaintiffs benefitted from the generic promotion program;
>
> (3) the extent to which plaintiffs' administrative assessments were applied to the Almond Board's generic promotion efforts; and
>
> (4) the extent to which plaintiffs have already "passed through" the costs imposed on them by the advertising assessments.

Plaintiffs take the position that the Ninth Circuit did fashion a remedy and left the mechanical mathematical calculation to the District Court, i.e., all advertising assessments, whether creditable or the administrative portion that the Board assessed for its generic program must be refunded because the Plaintiffs' remedy is a refund of all assessments 'found not to have been due'.

Although the court believes that plaintiffs are quoting the Ninth Circuit's opinion out of context in

an effort to imply that the Circuit actually held as argued by plaintiffs, *see Cal-Almond, Inc., supra*, 14 F.3d at 448-449, plaintiffs' assertion that the only reason that the Ninth Circuit's remand order referred to "fact-intensive nature of the inquiry" is because plaintiffs had requested of a refund of the entire amount of the assessments at issue is a valid comment. Plaintiffs contend that the Ninth Circuit's citations to *Chicago Teachers Union v. Hudson* and *Ellis v. Ry. Clerks* establishes that the Ninth Circuit rejected that assertion and concluded that plaintiffs were entitled only to a refund of that portion of the assessments at issue attributable to the unconstitutional advertising programs, a fact-intensive inquiry.

The court is persuaded that plaintiffs' interpretation of the reason that the Ninth Circuit referred to the two Supreme Court cases is a fair one. In both of these cases, but in particular *Ellis*, there was a combination of union dues imposed for legal and illegal reasons. In *Ellis*, the Supreme Court remanded for a recalculation of damages. In holding that the union would bear the burden of proving by a preponderance of the evidence what proportion of union expenditures went to activities that could be charged to dissenters, the Supreme Court noted that absolute precision in the calculation of such proportion is not expected or required because of the difficult accounting problems that may arise. *Ellis*, 466 U.S. at 457 n.15.

In disputing whether the Ninth Circuit's opinion forecloses or allows supplemental fact finding as argued by the Department, both parties refer the court to the concept of the "law of the case." The law

of the case is explained in *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985):

> The law of the case doctrine states that the decision of an appellate court on a legal issue 'must be followed in all subsequent proceedings in the same case.' . . . The law of the case controls unless the first decision is clearly erroneous and would result in manifest injustice, there has been an intervening change in the law, or the evidence on remand is substantially different . . . .
>
> . . .
>
> On remand, the trial court should only . . . consider '"matters left open by the mandate of [the appellate] court."' . . . .

The court concludes that its ability to conduct further supplemental fact-finding pursuant to the Ninth Circuit's remand is extremely limited. In the context of this action, the court concludes that the court may conduct supplemental fact-finding only with respect to the application of the assessments to the generic program. *See* discussion *infra*.

3. Benefit from Creditable Advertising Program.

The Department argues that the only issue foreclosed by the Ninth Circuit's decision is whether the benefit derived by plaintiffs from the two advertising programs was greater than the benefit plaintiffs could have secured if they had been free to spend that same money in any manner they chose. However, the Department contends, the Ninth Circuit's opinion does not address whether there was some benefit realized by the plaintiffs that should properly be

considered in making an equitable award determination.

However, the court agrees with plaintiffs that the supplemental fact finding sought to [*sic*] conducted here is foreclosed by the Ninth Circuit's opinion. The court does not read the opinion as allowing the Department to re-visit an issue determined against it.

4. Application of Assessments to Generic Program.

In their opening briefs, plaintiffs contended that the amount of the refund should be determined by the percentage of the Board's projected budget for a relevant crop year that was allocated for generic advertising purposes. Plaintiffs argued that if, for example, 25% of an [*sic*] projected budget was allocated to the generic advertising program, then 25% of plaintiffs' assessments for that year should be refunded.

However, the Department has presented evidence by way of a declaration of Michael L.H. Marsh, C.P.A., asserting that each year's generic promotion activities were largely funded not from administrative assessments, but from monies received during the previous crop years from handlers who did not fully utilize their advertising credit and instead remitted an amount equivalent to their unused credit to the Board. Since neither Cal-Almond nor Saulsbury Orchard and Almond Processing (SOAP) ever remitted such funds to the Board during the period in question, they can have no claim to that portion of the generic promotion budget paid from those carry-over funds. Although asserting that a final accounting has not yet been conducted, the Department asserts that a preliminary examination of the Board's financial

records suggest that approximately 81% of the generic promotion program was funded by these carry-over funds. The Department argues that a supplemental factual inquiry is necessary in order to fully resolve these accounting issues.

In their reply briefs, plaintiffs concede that a supplemental factual inquiry will be necessary to resolve this issue.

5. "Passed Through" Costs.

The Department argues that the court must conduct a supplementary factual hearing to determine the extent to which the plaintiffs have "passed through" the costs of the advertising assessments to the growers for whom they handle almonds. The Department contends that if plaintiffs have passed through any of these costs, then a complete refund of advertising assessments to the handlers would unjustly enrich the plaintiffs.

In making this argument, the Department refers the court to cases involving refunds of excise taxes. *See Rothman v. District Director of Internal Revenue*, 483 F.2d 1079, 1080-1081 (9th Cir. 1973); *Travel Industries of Kansas, Inc. v. United* States, 425 F>2d 1297, 1298 (10th Cir. 1970).

However, plaintiffs refer the court to *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). In *McKesson*, wholesale liquor distributors filed suit challenging the Florida excise tax that gave preferential treatment to beverages that were manufactured from Florida agricultural crops and then bottled in Florida. The Florida Supreme Court invalidated the excise tax as violating the Commerce Clause but refused to provide a refund or any other

form of postpayment relief. In pertinent part, the United States Supreme Court rejected the Florida Supreme Court's reliance on two equitable considerations as grounds for denying retroactive relief:

> The Florida Supreme Court also speculated that 'if given a refund [petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to [its] customers.' . . . The court's premise seems to be that the State, faced with an obligation to cure its discrimination during the contested tax period and choosing to meet that obligation through a refund, could legitimately choose to avoid generating a 'windfall' for petitioner by refunding only that portion of the tax payment not 'passed on' to customers (or even suppliers). Even were we to accept this premise, the State could not refuse to provide a refund based on sheer speculation that a 'pass-on' occurred. We repeatedly have recognized that determining whether a particular business cost has in fact been passed on to customers or suppliers entails a highly sophisticated theoretical and factual inquiry; a court certainly cannot withhold part of a refund otherwise required to rectify an unconstitutional deprivation without first satisfactorily engaging in this inquiry.
>
> In any event, however, we reject respondents' premise that 'equitable considerations' justify a State's attempt to avoid bestowing a so-called 'windfall' when redressing a tax that is unconstitutional because discriminatory. In *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386 . . . (1934), we enforced a statutorily created pass-on defense in a refund action designed to redress a

tax overassessment. Comparing such an action to one in assumpsit for 'money had and received,' we affirmed the Federal Government's power in this equitable action to withhold the amount that the taxpayer had already passed on to others, on the theory that the taxpayer ought not to be 'unjustly enriched' by his recovery from the Government after he has already 'recovered' his losses through the pass-on. We observed that if the taxpayer 'has shifted the [economic] burden [of the tax] to the purchasers, they and not he have been the actual sufferers and are the real parties in interest,' . . . and he ought not receive a windfall for their injury.

But petitioner does not challenge here a tax assessment that merely exceeded the amount authorized by statute; petitioner's complaint was that the Florida tax scheme unconstitutionally discriminated against interstate commerce. The tax injured petitioner not only because it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent that petitioner passed on the economic incidence of the tax to others), but also because it placed petitioner at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products . . . To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs (*e.g.*, for advertising) in an effort to maintain its market share. The State cannot persuasively claim that 'equity' entitles it to retain tax moneys taken

> unlawfully from petitioner due to its pass-on of the tax where the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation that rendered the deprivation unlawful in the first place. We thus reject respondents' reliance on a pass-on defense in this context.

496 U.S. at 46-49.

Plaintiffs argue that *McKesson* applies to preclude a pass through inquiry any time an assessment is found to be unconstitutional. Plaintiffs further argue that, because the Ninth Circuit has found that the regulations were designed to benefit Blue Diamond and since Blue Diamond benefitted from the regulations, Blue Diamond was able to out-compete plaintiffs for growers, offer the growers a better return, and cause economic injury to the plaintiffs.

At oral argument, defendant argues that plaintiffs' reliance upon *McKesson* is misplaced. Defendant contended that the nature of the constitutional violation must be examined in determining whether *McKesson* is applicable. In the case before the court, the First Amendment violations found to exist by the Ninth Circuit imposes [*sic*] the same burden on all handlers. In *McKesson*, however, the constitutional violation at issue was a discrimination in violation of the Commerce Clause.

The court concludes that *McKesson* is controlling. Although the constitutional violations are different and the First Amendment does not normally involve discrimination, it cannot be gainsaid that the Ninth Circuit was of the opinion that the advertising program benefitted Blue Diamond to the detriment of

other handlers, thereby placing those other handlers in a competative [*sic*] disadvantage.

6. Profit.

The Department further argues that the court should conduct a supplementary fact finding hearing to determine the extent to which plaintiffs profited from their own advertising expenditures incurred in order to receive credit against their annual assessments. In making this argument, the Department refers the court to the statement in the Ninth Circuit's opinion that "Saulsbury estimated that every dollar spent on creditable advertising returned less than fifty cents in sales." 14 F.3d at 438. In addition, the Department refers to the statement that "in 1987 Cal-Almond spent nearly $300,000 advertising the business but its gross mail order sales were less than $100,000." *Id.* at 438 n.8. The Department implies from these two statements that the Ninth Circuit explicitly conceded that the creditable advertising engaged in by the plaintiffs was not wholly ineffective. The Department asserts that the record establishes that plaintiffs made some sales as a result of their advertising expenditures that they would not have realized without those expenditures and that plaintiffs should subtract the sales actually resulting from creditable advertising from any request for a refund of monies spent on creditable advertising.

Plaintiffs oppose this request, calling it "just another distorted and depraved effort by the Government to delay and deprive Plaintiffs of their victory in

the landmark Ninth Circuit decision."[5] Plaintiffs further assert that the reference to Saulsbury's evidence was to gross sales and not to net sales. Plaintiffs also argue that "if Saulsbury and Cal-Almond were not required to wastefully spend hundreds of thousands of dollars per year on Government ordered advertising, there can be no facts, other than utterly speculative facts, as to how much money the Plaintiffs would have made without said unconstitutional assessments, and if left with their money and with their own devices to promote their product in their own targeted markets."

Although the court can understand the logic of the Department's position, it is foreclosed by the Ninth Circuit's opinion just as the determination of the extent to the benefit to plaintiffs from the invalidated programs should be foreclosed. As discussed by the Ninth Circuit, the programs did not benefit the participants sufficiently to overcome the constitutional infirmities. That being the case, the court agrees with plaintiffs that any further inquiry into profit moves into the realm of speculation.

ACCORDINGLY, IT IS ORDERED that the respective plaintiffs' Post-Remand Motions for Refund of Almond Board Assessments are granted.

IT IS FURTHER ORDERED that defendant's respective Motions for Remand are denied.

IT IS FURTHER ORDERED that the parties appear on Monday, September 26, 1994 at 1:30 p.m. for

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[5] Depraved, by the way, means marked by corruption, perversion or deterioration. I think that Brian is pitching it pretty strong.

further proceedings in connection with the application of assessments to the generic program. The parties are ordered to be prepared to present their respective factual positions to the court with respect to this issue at this hearing.[6]

Dated: September 6, 1994

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District
Judge

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[6] The court advises the parties that it will not issue any final orders with respect to refunds until this factual issue is resolved.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

D.C. DOCKET NO. CV-F-91-064-REC

CAL-ALMOND, INC., SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC. AND CARLSON FARMS, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

D.C. DOCKET NO. CV-F-91-122-REC
JUDGMENT AND ORDER THEREON

CAL-ALMOND, INC. PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

D.C. DOCKET NO. CV-F-91-123-REC

CAL-ALMOND, INC., A CALIFORNIA CORPORATION: GOURMET PACKING COMPANY, INC., A CALIFORNIA CORPORATION; AND GOLD HILLS NUT COMPANY, INC., A CALIFORNIA CORPORATION, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE AND THE UNITED STATES OF AMERICA, DEFENDANTS

D.C. DOCKET NO. CV-F-91-685-REC

CAL-ALMOND, INC. AND GOLD HILLS NUT COMPANY, INC., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

D.C. DOCKET NO. CV-F-92-5684-REC
JUDGMENT AND ORDER THEREON

CAL-ALMOND, INC.; GOLD HILLS NUT COMPANY, INC.; AND FRAZIER NUT FARMS, INC., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

[Lodged Sept. 19, 1996]

JUDGMENT AND ORDER

The above entitled cases came on for a hearing on July 18, 1994 as a result of the above entitled Plaintiffs' respective post-remand motions for refund of Almond Board assessments and the Defendants' respective motions on remand, following the Ninth Circuit Court of Appeals opinion in *Cal-Almond Inc. et al. vs. The United States Department of Agriculture* (and related cases), 14 F.3d 429 (9th Cir. 1993), which resulted in an order of this Court of September

6, 1994 in the above entitled cases. The issues to be resolved were the extent to which advertising assessments assessed against each of the Plaintiffs in the above entitled action should be refunded. Following this Court's order of September 6, 1994 parties agreed that the following sums of money were at issue for the almond crop years of 1980-1981 through 1991-1992 crop years.

CAL-ALMOND, INC.

A. Amounts spent on creditable advertising $1,433,619.96

B. Creditable advertising assessments paid to Almond Board $22,650.00

C. Amount of creditable advertising assessments placed in or credited to an attorney/client trust fund account $1,147,549.03

D. Portion of annual assessments applied towards the Almond Board's generic promotional activity $45,637.41

IT IS HEREBY ORDERED AND ADJUDGED THAT: The Defendants in the above entitled action are to forthwith pay to Cal-Almond, Inc. through its attorney, Brian C. Leighton at 701 Pollasky, Clovis, California 93612, the collective sums in paragraphs A, B and D above, the total amount of which is $1,501,907.37. **IT IS FURTHER ORDERED** the amounts in paragraph C above, the amounts credited to the attorney/client trust fund account, are hereby released to Cal-Almond, Inc.

SAULSBURY ORCHARDS

A. Amounts deposited with the Clerk of the Court in that certain case entitled United States of America vs. Saulsbury Orchards & Almond Processing, No. CV-F-86-87 (EDP) now REC $529,406.25 plus accrued interest.

B. Amounts spent on creditable advertising $807,327.53

C. Portion of annual assessments applied towards the Almond Board's generic promotional activities $23,984.00

IT IS HEREBY ORDERED AND ADJUDGED that the Defendants in the above entitled case forthwith pay to the Trustee, Ellen Briones at P.O. Box 14173, Pinedale, California 93650, Trustee of Saulsbury Orchards & Almond Processing in that certain bankruptcy action entitled In Re: Saulsbury Orchards & Almond Processing, Inc., a California corporation, Debtor, Case No. 91-10898A-11F (Chapter 11 proceeding now converted to a Chapter 7 proceeding) the sums listed in paragraph B above the total of which is $831,311.93. A separate court order and judgment thereon is being issued in case No. 86-87, described above, with respect to paragraph A above and directed to the Clerk of the Court.

CARLSON FARMS

A. Amount of creditable advertising assessments paid to Almond Board $38,128.19

B. Portion of annual assessments applied towards the Almond Board's generic promotional activities $00.00

IT IS HEREBY ORDERED AND ADJUDGED that the sum of $38,128.19 be forthwith paid by the Defendant in the above entitled action to Carlson Farms, through its attorney, Brian C. Leighton, 701 Pollasky Avenue, Clovis, California 93612.

GOLD HILLS NUT COMPANY, INC.

A. Amount spent on creditable advertising $180,438.50

B. Portion of annual assessments applied towards the Almond Board's generic promotional activities $3,399.42

IT IS HEREBY ORDERED AND ADJUDGED the total sums above, $183,837.92 be paid by the Defendant in the above entitled actions to Gold Hills Nut Company, Inc. through its attorney, Brian C. Leighton, 701 Pollasky, Clovis, California 93612.

FRAZIER NUT FARMS, INC.

A. Amount spent on creditable advertising $64,468.67

B. Creditable advertising assessments paid to the Board $00.00

C. Amount of creditable advertising assessments placed in escrow (attorney/client trust fund account) $32,024.90

D. Portion of annual assessments applied towards the Almond Board's generic promotional activities $1,627.79

IT IS HEREBY ORDERED AND ADJUDGED that the total sums of money stated in paragraphs A and D, the total of which is $66,096.46 be forthwith paid by the Defendant in the above entitled actions to Frazier

Nut Farms, Inc. through its attorney, Brian C. Leighton, 701 Polasky, Clovis, California 93612. It is further ordered that the amounts of creditable advertising assessments placed in the attorney/client trust fund account be released to Frazier Nut Farms, Inc.

The Clerk of the Court is hereby directed to place a conformed copy of this ordert in the files of each of the above entitled cases.

September 19th, 1994

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

NOS. 92-16033, 92-16034, 92-16031 AND 92-16527

CAL-ALMOND, INC., A CALIFORNIA CORPORATION
PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
DEFENDANT-APPELLEE

CAL-ALMOND, INC., A CALIFORNIA CORPORATION,
SAULSBURY ORCHARD AND ALMOND
PROCESSING, INC., CARLSON FARMS, A SOLE
PROPRIETORSHIP, PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
DEFENDANT-APPELLEE

CAL-ALMOND, INC., A CALIFORNIA CORPORATION,
GOURMET PACKING CO., A CALIFORNIA
CORPORATION, GOLD HILLS NUT CO., INC.,
A CALIFORNIA CORPORATION,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
DEFENDANT-APPELLEE

CAL-ALMOND, INC., A CALIFORNIA CORPORATION,
GOLD HILLS NUT CO., INC., A
CALIFORNIA CORPORATION, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA
DEFENDANT-APPELLEE

Argued and Submitted Jan. 12, 1993
Decided Dec. 22, 1993.

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

Two groups of almond handlers are challenging various provisions of the California Almond Marketing Order, which regulates the California almond handling industry. Both groups challenge the United States Department of Agriculture ("USDA") almond marketing program administered by the California Almond Board (the "Board"). The first group is also separately challenging the assessment imposition procedure used by the Board from 1980 to 1986. The second group is separately challenging the validity of the reserve requirement rules for the crop years 1988-89 and 1990-91. The district court affirmed a USDA Judicial Officer decision upholding the Almond Marketing Order against these challenges, and the handlers appeal. We affirm the district court's decision on the assessment imposition procedure and the reserve requirement rules, but hold that the marketing program violates appellants' First Amendment rights to freedom of expression and association.

I. THE ALMOND MARKETING PROGRAM

A. *Facts and proceedings below.*

Appellants Cal-Almond, Saulsbury Orchards, and Carlson Farms are "handlers" of California almonds. They receive almonds from growers, process them, and sell the resulting product, primarily for use as ingredients in candy, ice cream, and cereal. Cal-Almond and Saulsbury also operate mail-order businesses through which they sell whole almonds.

The California almond handling industry is regulated by the Almond Marketing Order, 7 C.F.R. § 981 (the "Order"). The Order was established in 1950 by USDA pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c (the "Act"). The purpose of the Act is to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce" as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. §§ 602(1), 602(4) (1988). The Act authorizes the Secretary of Agriculture (the "Secretary") to issue, following notice and an opportunity for hearing, marketing orders that will "tend to effectuate the declared policy of [the Act]" with respect to the particular commodity. 7 U.S.C. § 608c(4) (1988).

The Order is administered by the Board, which has the power to "make rules and regulations to effectuate the terms and provisions" of the Order. 7 C.F.R. § 981.38 (1993). The Board has ten members, all of whom are industry representatives appointed by the Secretary. The Board engages in a variety of activities, including research and development, marketing, quality control, and volume regulation. The Act specifically provides that the Order may establish

"marketing research and development projects designed to assist, improve, or promote the marketing" of almonds. 7 U.S.C. § 608c(6)(I) (1988). Pursuant to this authorization, the Board funds a generic pro-almond public relations program, consisting of such items as newspaper inserts containing almond recipes, leaflets and magazine articles about the benefits of almonds, promotional materials for school lunch programs, and press kits for industrial customers.

The money to pay for the Board's activities, including the marketing program, comes from assessments collected from handlers, based on the volume of almonds they handle. However, the Act and the Order provide that a handler's assessment will be reduced, up to a point,[1] by the amount that the handler spends on authorized advertising.[2] Before a handler can receive credit for his marketing promotion expenditures, the Board must determine that such expenditures meet the requirements of the "creditable

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[1] A handler may receive credit against his assessment in an amount not to exceed "that portion of his assessment designated for marketing promotion including paid advertising." 7 C.F.R. § 981.41(c) (1993). For example, for the 1986-87 crop year, the overall assessment was 2.6 ¢ per pound, and the maximum credit was 2.5 ¢ per pound.

[2] The Act provides that handlers may receive credit "for such marketing promotion including paid advertising as may be authorized by the [O]rder." 7 U.S.C. § 608c(6)(I) (1988). The Order authorizes the Board, with the approval of the Secretary, to provide "for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products, or their uses." 7 C.F.R. § 981.41(c) (1993).

advertising regulations" set forth in 7 C.F.R. § 981.441.

The Order thus establishes an overall almond marketing program, which combines generic almond promotion conducted by the Board with Board-approved handler advertising. Beginning in 1984, appellant Saulsbury, which strongly opposed this program, refused to pay its annual assessments to the Board. In 1986, the United States sought an injunction in federal district court, pursuant to 7 U.S.C. § 608a(6), to compel payment of some $300,000 in assessments which Saulsbury allegedly owed and had not paid to the Board. *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1193 (9th Cir.1990). The district court granted summary judgment in favor of the government, and ordered Saulsbury to comply with the Order and pay the assessments. *Id.* The court refused to entertain Saulsbury's affirmative First Amendment defenses because it found that Saulsbury had not exhausted its administrative remedies pursuant to 7 U.S.C. § 608c(15)(A).

In April 1987, Saulsbury, joined by appellants Cal-Almond and Carlson Farms, filed an administrative petition, pursuant to 7 U.S.C. § 608c(15)(A), challenging numerous parts of the Order (including the almond marketing program) for the crop years 1980-87.[3] Following a hearing in the summer of 1989,

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[3] Saulsbury, believing that it would suffer irreparable injury if it were forced to exhaust its administrative remedies, also filed a complaint in district court, again alleging that the Order was unconstitutional. The district court again dismissed the action on the ground that Saulsbury had failed to exhaust

a USDA administrative law judge ("ALJ") issued a decision on June 22, 1990 upholding some of appellants' challenges but rejecting others, including the challenge to the marketing program. Both sides appealed the ALJ's decision to the USDA Judicial Officer ("JO"). On January 23, 1991, the JO upheld the Order in all respects.

Meanwhile, Cal-Almond had filed another petition pursuant to 7 U.S.C. § 608c(15)(A), challenging a specific section of the creditable advertising regulations, 7 C.F.R. § 981.441(c)(2), for the crop year 1988. The ALJ upheld the challenge, but his decision was reversed by the JO. The two petitions were consolidated for cross-motions for summary judgment to the district court. On June 3, 1992, the district court issued an order upholding the JO's decisions in their entirety. Appellants appeal this order.

B. *Standard of review.*

We review de novo a district court's grant of summary judgment. *T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir.1987). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989).

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its administrative remedies. *Saulsbury*, 917 F.2d at 1193. We affirmed the dismissal in *Saulsbury*. *Id.* at 1197.

C. *Discussion.*

1. *Infringement on appellants' First Amendment rights.*

The district court held that the almond marketing program did not even implicate, let alone violate, appellants' First Amendment rights, "because plaintiffs are not 'compelled' to advertise." However, while the Order clearly does not compel appellants to advertise, it does compel them to expend a certain sum of money every year, on either assessments or creditable advertising. Since either alternative burdens appellants' First Amendment rights, these rights are clearly implicated by a program containing both.

Assume first that the creditable advertising regulations did not exist and that handlers paid the full amount of their assessment to the Board. A substantial portion of that amount would be used by the Board for the generic almond promotion program, which infringes on appellants' First Amendment right to be free from compelled speech and association. *See United States v. Frame*, 885 F.2d 1119 (3d Cir.1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990). Frame involved a First Amendment challenge to the Beef Promotion and Research Order, 7 C.F.R. §§ 1260.101-.217, promulgated by USDA pursuant to the Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11. The Beef Promotion Order established a "Cattlemen's Board," whose goal would be to increase beef sales, and authorized it to collect an assessment of $1.00 per head of cattle from cattle producers and importers. *Id.* at 1122-23. Frame, a cattle breeder and auctioneer, refused to pay the assessment, and, when sued by the

federal government, asserted that the Beef Promotion Act violated his First Amendment rights of free association and free speech. *Id.* at 1129.

The Third Circuit noted first that citizens arguably do not have the right to refuse to support financially government programs that involve speech they find objectionable. *Id.* at 1131. However, the court also found that the promotional expression sponsored by the Cattlemen's Board could not properly be characterized as "government speech"

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a *publicly identified group* to contribute to a fund earmarked for the dissemination of a *particular message associated with that group*, the government has directly focused its coercive power for expressive purposes . . . This sort of funding scheme [establishes a] close nexus between the individual and the message funded.

Id. at 1132 (citations omitted) (emphasis added). The court found that the Beef Promotion Act implicated Frame's First Amendment rights because it resembled other funding schemes that the Supreme Court had held to implicate individuals' First Amendment rights. *Id.* at 1132-33, citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (union-management agency shop

agreements, which require that every employee pay the union a service charge equal in amount to union dues, impinge on employees' rights to be free from compelled affirmation of belief and compelled association for expressive purposes) and *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (state law requiring citizens to bear state slogan, "Live Free or Die," on automobile license plates, implicates First Amendment rights because law requires individuals to participate in the dissemination of an ideological message).

The Board's almond promotion program closely resembles the beef promotion program at issue in Frame. In both cases, a "publicly identified group" (cattlemen or almond handlers) must contribute money to fund the "dissemination of a particular message associated with that group." For the same reason that the beef program implicated Frame's First Amendment right to be free from compelled speech and association, then, the Board's promotional efforts implicate appellants'.

Assume next that the Order imposed on handlers no assessment or other compelled contribution to the Board whatsoever, but only required that they spend the equivalent sum every year on advertising that met the requirements of 7 C.F.R. § 981.441. Such an Order also would clearly implicate appellants' First Amendment rights, both because it would compel them to speak and because it would impose content-based restrictions on that speech. *See Wooley*, 430 U.S. at 714, 97 S.Ct. at 1435 ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

Thus, both an assessment-only program and an advertising-only program would implicate appellants' First Amendment rights. Because the Order is a combination of both, it implicates those rights as well. USDA's argument that the creditable advertising regulations do not implicate those rights because they do not "compel" appellants to advertise ignores the fact that if handlers do not advertise according to the regulations, they must contribute their assessment to the Board,[4] which is itself a type of compulsion implicating appellants' First Amendment rights.

2. *Type of speech restricted.*

Having determined that the almond marketing program implicates appellants' First Amendment rights, we must now select the proper standard to evaluate the constitutionality of the program. Appellants claim, and we agree, that the program infringes on both their right to free speech and their right to free association. The Supreme Court has established different tests for each of these. Restrictions on

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[4] Handlers may also earn credits by engaging in other promotional activities, such as distributing sample packages of almonds to charitable or educational outlets, purchasing promotional materials available from the Board, or certain direct mail promotions. 7 C.F.R. 981.441(d)(1)(i)-(iii) (1993). The availability of such options does not change the First Amendment analysis; they simply represent other types of expressive activity the only alternative to which is the compelled assessment. In practice, the "vast majority" of creditable advertising expenditures are spent on advertisements and not on these alernatives.

lawful and non-misleading commercial speech[5] are evaluated using the three-prong standard of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). First, the asserted government interest behind the restrictions must be "substantial." *Id.* at 566, 100 S.Ct. at 2351. Second, the restrictions must "directly advance[ ] the governmental interest asserted." *Id.* Third, the restrictions must be "not more extensive than is necessary to serve that interest." *Id.*

Government programs that compel association are evaluated under a more stringent standard. The Supreme Court has recognized that "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984). *See also IDK, Inc. v. Clark County*, 836 F.2d 1185, 1192 (9th Cir.1988) ("[t]he first amendment . . . gives us the freedom not to assemble with those whose goals we do not share."). In *Roberts*, the Supreme Court held that infringements on the right of free association must be "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means signifi-

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[5] "Commercial speech" is that which "propose[s] a commercial transaction." *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986) (quotation omitted). All of the promotional efforts undertaken by the Board, whether directly (through its own activities) or indirectly (through the inducements of the creditable advertising regulations), are aimed at increasing almond sales. The program therefore deals with commercial speech.

cantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623, 104 S.Ct. at 3252. The *Frame* majority applied this test to the Beef Promotion Act. *See Frame*, 885 F.2d at 1134. However, because we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard, we do not decide which of these two should apply. *See id.* at 1146 (Sloviter, J., dissenting).

Appellants contend that their own almond advertising contains a mixture of commercial and political speech and is therefore entitled to a higher level of protection under *Riley v. National Fed'n of Blind*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Riley addressed a First Amendment challenge to a North Carolina requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity. *Id.* at 795, 108 S.Ct. at 2676-77. The Supreme Court found the regulation unconstitutional under strict scrutiny. *Id.* at 798, 108 S.Ct. at 2678. The Court applied strict scrutiny because although the speech at issue was arguably commercial, and thus subject to a more deferential standard of review, "the speech [does not] retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech"—in that case, charitable solicitation. *Id.* at 796, 108 S.Ct. at 2677 (emphasis added).

In the present case, however, the commercial speech, although arguably "compelled," is not *inextricably* intertwined with higher-value noncommercial speech. Appellants' political appeals are not

essential components of their advertisements. "[A]dvertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 n. 7, 105 S.Ct. 2265, 2274 n. 7, 85 L.Ed.2d 652 (quotation omitted). Thus, the *Riley* rationale for applying strict scrutiny is not present here.

3. *Application of the Central Hudson test.*

Once again, for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be "substantial," (b) the program must "directly advance" that interest, and (c) the program must not be more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, — U.S. ——, ——, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

(a) Substantial government interest.

We "must identify with care the interests the State itself asserts." *Edenfield*, at ——, 113 S.Ct. at 1798. USDA claims that the government has a "compelling and important interest in promoting the consumption of almonds" in order to "provide for greater stability in the products of agriculture" and "protect the income of farmers." Brief for the Appellee at 32. The Act itself states that the purpose of the creditable advertising program is to "assist, improve, or promote the marketing, distribution, and consumption of

[almonds]." 7 U.S.C. § 608c(6)(I) (1988). *See also* 36 Fed.Reg. 20,887, 20,888 (1971) (the program will "provide an additional method of stimulating almond consumption"); 35 Fed.Reg. 7428, 7432 (1970) (the program will provide the "opportunity to stimulate the demand for almonds"). We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest. *See Frame*, 885 F.2d at 1134 (government has a compelling interest in "maintaining and expanding beef markets" in order to "prevent [ ] further decay of an already deteriorating beef industry).

(b) Direct advancement of the interest.

Next, USDA must show that the program "directly advances the governmental interest asserted." *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351. "[T]he regulation[s] may not be sustained if [they] provide[ ] only ineffective or remote support for the government's purpose." *Id.* at 564, 100 S.Ct. at 2350. Furthermore, we may not simply defer to legislative and executive judgment on this question; we must determine ourselves whether the program directly advances USDA's asserted interests. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n. 22, 104 S.Ct. 2118, 2127 n. 22, 80 L.Ed.2d 772 (1984). We apply this test first to the creditable advertising regulations specifically, and then to the overall almond promotion program.

Because the Order forces each handler to fund Board promotional efforts with every assessment dollar not spent on creditable advertising, USDA

must show both that the advertising for which credit is *granted* is *better* at selling almonds than the Board's own efforts *and* that the advertising for which credit is *denied* is *worse* at selling almonds than the Board's own efforts. As a starting point for our analysis, therefore, we must determine how effective the Board's own almond promotion efforts are. USDA has presented little solid evidence on this question. The following exchange, which occurred at the hearing before the ALJ between counsel for Cal-Almond and Skip Hubbard, chairman of the Board's Public Relations and Advertising Committee, is highly instructive:

Q: [H]as the Public Relations and Advertising Committee since you have been chairman, ever hired somebody to analyze whether or not the creditable advertising rules and the assessment amount spent on advertising, have caused more sales of almonds?

A: It has not been—we have not ha[d] a survey conducted.

Q: So would it be safe to say that you don't have any empirical data as to whether or not the advertising assessments have assisted in the . . . sale and consumption of almonds?

A: No study has been made on that.

Q: Has any study been made as to whether or not certain provisions of section 981.441 have created more sales or less sales than other provisions?

A: We have not commissioned any study for that. [. . .]

Q: [. . .] Has the Almond Board, the Public Relations and Advertising Committee, ever made a determination as to whether or not the advertising itself, or the promotion itself, done by the Board has increased grower returns?

A: The Committee believes that the promotional activities are beneficial to grower returns.

Q: [. . .] Has any study been conducted?

A: No.

Transcript of 1/25/90 hearing before USDA ALJ Hunt at 158-60.[6] Because USDA has presented little or no evidence regarding the effectiveness of the Board's promotional efforts, it cannot show that the creditable advertising regulations "directly advance" the government's interest in increased almond sales by enhancing the effectiveness of those efforts.[7] *See*

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[6] Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that a professor at the University of California-Davis had conducted a study whose results demonstrated that the advertising program had been successful in increasing grower returns. However, this study is not part of the record.

[7] USDA asserts that creditable advertising may "reasonably be expected to increase the sale of almonds," Brief for the Appellee at 31, and cites to the rule-making records underlying the regulations to support its assertion. However, these records address only minor amendments to the regulations made

Edenfield, — U.S. at ——, 113 S.Ct. at 1800 (Florida Board of Accountancy fails to justify ban on personal solicitation of prospective business clients by accountants when it provides no studies or anecdotal evidence suggesting that such solicitation creates the asserted dangers of fraud, overreaching, or compromised independence).

In fact, most of the evidence in the record indicates that the regulations *hinder* the handlers' efforts to increase sales and returns to growers. For example, most of appellant Saulsbury's sales were to cereal companies, but Saulsbury could not receive credit for advertising the cereals containing its almonds because the regulations deny credit for products that do not contain at least 50 percent raw shelled almonds by weight and do not display the handler's brand. *See* 7 C.F.R. § 981.441(c)(3)(iv). When a chain of minimarkets in the Boise, Idaho area agreed to carry Saulsbury almonds, Saulsbury could not receive credit for advertisements directing consumers to those stores because the regulations deny credit for advertisements directing consumers to retail outlets not "operated" by a handler. See 7 C.F.R. § 981.441(c)(5)(iii). Because of these restrictions, Saulsbury estimated that every dollar spent on

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during the past decade, and not to the initial adoption of the bulk of the regulations, including the most restrictive ones. *See, e.g.*, 49 Fed.Reg. 19,978 (May 10, 1984) (increasing the amount of credit handlers receive for advertising almond butter); 50 Fed.Reg. 16,451 (April 26, 1985) (doubling the portion of creditable advertising that may be carried over from one crop year to the next); 52 Fed.Reg. 13,427 (April 23, 1987) (allowing credit for the cost of purchasing mailing lists, envelopes and postage used in mail order promotions).

creditable advertising returned less than fifty cents in sales.

Cal-Almond's experience with the regulations was similarly disappointing. Cal-Almond exports approximately 90 percent of its almonds for use as ingredient items, and nearly all of the almonds it sells domestically are used in ice cream. However, like Saulsbury and cereal, Cal-Almond cannot obtain credit for advertising this ice cream because the regulations forbid it. The only creditable advertising of any use to Cal-Almond is that promoting its mail order business, which is not a profitable undertaking.[8] Overall, the evidence indicates that the regulations hinder, rather than help, appellants' efforts to sell their almonds.

Finally, there is no evidence that the regulations stimulate additional or more effective advertising from other handlers. Blue Diamond is by far the largest handler and overwhelmingly dominates the retail market;[9] to "directly advance" the government interest in increasing almond sales, the regulations would have to give Blue Diamond an incentive to advertise more. The record indicates, however, that they do not. Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that Blue Diamond would "probably" continue to spend just as much money advertising even if the regulations did not exist. Walter Payne, Blue Diamond's vice president for sales, marketing and distribution,

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[8] For example, in 1987 Cal-Almond spent nearly $300,000 advertising the business but its gross mail order sales were less than $100,000.

[9] As of July 1987, Blue Diamond had a 92 percent share of almonds sold in grocery stores.

testified that Blue Diamond would advertise the same amount and in the same manner in the absence of the regulations.

In sum, the record indicates that the regulations do not stimulate additional or more effective advertising from Blue Diamond. Appellants have presented evidence showing that the regulations hinder their own marketing efforts, and USDA has presented no evidence that the regulations assist the efforts of other handlers. Therefore, we hold that the regulations do not "directly advance" the government's asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellants' First Amendment rights.

Whether the entire assessment-funded almond promotion program "directly advances" the governmental interests in increased almond sales and returns to growers is a more difficult question. The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised. *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) ("[w]e think [that] the legislature's belief [that advertising of casino gambling would serve to increase the demand for the product advertised] is a reasonable one"); *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353 ("[t]here is an immediate connection between advertising and demand for electricity."). Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand (although, as noted above, the Board does not know how significant the effect is).

However, because these efforts are funded with money that handlers would presumably have spent on their own advertising, we cannot compare the Board's program with a no-advertising situation; we must compare it to a situation where handlers spent their assessments on their own marketing. USDA has presented no evidence tending to show that the generic Board promotion financed by that money sells almonds more effectively than the specific, targeted marketing efforts of individual handlers.[10] We agree with appellants' argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson. The USDA has failed to meet its burden of showing that the overall almond marketing program "directly advances" its stated goals of selling more almonds and increasing returns to producers.[11]

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[10] Once again, appellants have presented evidence to the contrary. Cloyd Angle, the president of Cal-Almond, testified that the best way for him to sell almonds is to bring potential customers to his plant and show them the cleanliness and efficiency of his processing facilities. Spending money on generic Board promotion does not help him do this.

[11] The *Frame* majority held that mandatory assessments to the Cattlemen's Board advanced the goals of the Beef Promotion Act because they "prevent[ed] 'free riders' from receiving the benefits of the promotion and research program without sharing the cost." *Frame*, 885 F.2d at 1135. USDA could make a similar argument here (although it has not). Such a conclusion, however, presumes that the promotion itself advances the goals of the Act, a presumption that we have rejected.

(c) Not more extensive than necessary.

USDA must prove that the regulations are no more extensive than necessary to serve the interest of increasing almond sales. The Supreme Court held in *Board of Trustees of State Univ. v. Fox* that this standard is not as strict as a "least restrictive means" test:

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989).

USDA asserts that "[a]lthough it is possible that some forms of advertising, though ineligible for credit, might also increase the sale of almonds, the regulations reflect a reasonable judgment that the Board will make better use of those monies in its market promotion programs." However, once again, USDA offers no evidence in support of this "reasonable judgment." It certainly seems reasonable to assume that the advertisements for which credit is explicitly *permitted*—generic advertisements, expenditures for advertisements announcing future promotion activities, and in-store supermarket advertisements—will increase almond sales. However, USDA offers *no* justifications for the restrictions that *deny* credit for certain advertisements: ads

promoting more than two complementary branded products (§ 981.441(c)(5)(i)), ads promoting a product that also has "competing nuts" (§ 981.441(c)(5)(ii)), or ads promoting retail stores not owned by handlers (§ 981.441(c)(5)(iii)). It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. This court has interpreted *Fox* as holding that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir.1991). The creditable advertising regulations disregard such means, and therefore are more extensive than necessary to serve the interest of increasing almond sales. As the USDA has failed to present sufficient evidence to satisfy the requirements of the *Central Hudson* test, the Almond Marketing Program violates appellants First Amendment rights.

II. THE ASSESSMENT IMPOSITION PROCEDURES

A. *Facts and proceedings below.*

As noted above, the funds required to finance the Board's activities are generated through assessments authorized by the Act. The Order specifically provides that the assessment shall be "such rate per pound of almonds . . . received by [the handler] for his own account . . . as the Secretary finds is necessary to

provide funds to meet the authorized [B]oard expenses and the operating reserve requirements." 7 C.F.R. § 981.81(a) (1993).

For the crop years 1980 through 1986, USDA issued final rules containing budget estimates and assessment rates without first publishing a proposed rule and requesting comments. Appellants contend that this procedure violated the rule making requirements of the Administrative Procedure Act (APA), which requires "[g]eneral notice of proposed rule making . . . unless persons subject thereto are named and either personally served or otherwise have actual notice thereof." 5 U.S.C. § 553(b) (1988) (the "notice" requirement). The agency is also required to give "interested persons an opportunity to participate in the rule making" (the "comment" requirement) and "[a]fter consideration of the relevant matter presented . . . incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1988). In addition to the time required for the notice-and-comment procedure, an additional thirty days must pass between the time the final rule is passed and the time it takes effect. 5 U.S.C. § 553(d) (1988).

Following appellants' administrative challenges to the assessment imposition procedure,[12] the ALJ found that notice and comment pursuant to the APA should have been allowed. The JO disagreed and ruled that "good cause" existed for dispensing with notice and comment because the Secretary had discretion to authorize such expenses as were reasonable and

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[12] Outlined in section I.A. above.

likely to be incurred and because arriving at the assessment rate was a ministerial and mechanical calculation. The district court agreed with the JO.

B. *Discussion.*

1. *Notice and comment.*

We review de novo "the district court's determinations on issues of statutory interpretation, including the scope of the notice-and-comment and publication requirements imposed by the APA." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1011 (9th Cir.1987). We hold that although the assessments are "rules" subject to the notice-and-comment requirement of the APA, the Secretary's failure to give notice and request comments was harmless.

The APA defines a "rule" as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and *includes the approval or prescription for the future of rates.*

5 U.S.C. § 551(4) (1988) (emphasis added). We agree with appellants that establishing an assessment is a "prescription for the future of rates." The Order itself defines the assessment as a "rate per pound of almonds." 7 C.F.R. § 981.81(a) (1993). USDA's argument that the assessment procedure is not a rule because it is simply the mechanical result of the Secretary's approving an agency's budget fails under the D.C. Circuit's opinion in *Batterton v. Marshall*,

648 F.2d 694 (D.C.Cir.1980). There, the court held that the exemption for budgetary approval does not apply "where the agency action trenches on substantial private rights and interests." *Id.* at 708 (footnote omitted). Because the assessment rate directly affects the financial interests of appellants and other almond handlers, it is not exempt from the notice-and-comment requirements of the APA.

The district court held that the Secretary's failure to follow the notice-and-comment procedure was excused by the "good cause" exception to the APA, which excuses such failure

> when the agency for *good cause* finds (and incorporates the finding and a brief statement of reasons thereof in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(B) (1988) (emphasis added). The announcement accompanying the rules provided the following justification for dispensing with the notice-and-comment procedure:

> To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expense and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the [A]ct it is necessary to make these provisions effective as specified.

45 Fed.Reg. 56,794 (1980). USDA contends that since the Board's annual harvest forecast and proposed budget both depend on crop projections for that year,

the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA.[13]

We disagree, based on our opinion in *Riverbend Farms Inc. v. Madigan*, 958 F.2d 1479 (9th Cir.), *cert. denied*, — U.S. ——, 113 S.Ct. 598, 121 L.Ed.2d 535 (1992). In *Riverbend Farms*, handlers of navel oranges challenged the procedure used by the Secretary to set weekly volume restrictions on the marketing of the oranges. We first noted that

> the good cause exception goes only as far as its name implies: It authorizes departure from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission. The agency thus must minimize conflict with the APA by complying with those APA requirements it is capable of complying with.

Id. at 1485. We then held that even though the volume-setting meetings were conducted weekly, the Secretary had no reason not to give notice of them (by means of publication in the *Federal Register*) or allow written comments before promulgating weekly volume restrictions. *Id.* at 1486. Because we found no reason in *Riverbend Farms* to depart from the notice-and-comment procedure for *weekly* meetings and rules, we can discern no good cause here for the

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[13] The Board recommended assessment rates at the annual July meeting. However, in the years from 1980 to 1986, the earliest the Secretary issued the final rule was August 26 in 1980, and the latest was October 19 in 1982.

Secretary's failure to follow the procedure for annual meetings and rules.

We also cannot find good cause for the failure to wait thirty days before allowing the rule to take effect. In *Riverbend Farms*, we noted two reasons for the waiting period: it gives affected parties time to adjust their behavior before the final rule takes effect, and it usually causes no harm. *Id.* at 1485. These reasons apply to the almonds context. From 1980 to 1986, delaying the effective date of the rules by thirty days would have caused no harm, because the Secretary always waited at least thirty days before adopting a final rule anyway. Furthermore, the thirty days would have given handlers an opportunity to estimate their future costs and prices before the rule went into effect. Therefore, we can see no reason not to follow this requirement, and hold that the Secretary has failed to provide good cause for his failure to follow the procedure mandated by the APA.

However, we find this failure to be harmless. "We have held that the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" *Riverbend Farms*, 958 F.2d at 1487 (quoting *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir.1986)). Our harmless error analysis "must therefore focus on the process as well as the result." *Id.* (emphasis added). In *Riverbend Farms*, we ultimately concluded that the Secretary's failure to comply with the APA's notice-and-comment requirements in promulgating the weekly navel orange volume restrictions was harmless because the handlers knew that there would be meetings every

Tuesday, that proposed restrictions would be contained in a position paper issued prior to the meetings, and that the meetings would provide the opportunity for public comment. Therefore, the handlers were not prejudiced by the Secretary's failure to follow the notice and comment procedure, and the error was harmless. *Id.* at 1488.

The Secretary's error in the instant case is harmless for the same reasons. The Board holds open meetings in July of each year to gather information relevant to estimating its budget and the resulting assessment rate. During these meetings, the Board receives comments and testimony from any and all interested parties. After deciding on its recommendations, the Board directly notifies each almond handler of the proposed assessment rate. The Board then submits its recommendations to the Secretary for approval; from 1980 to 1986, the assessment rate set by the Secretary in the final rule was the same as the rate that had been recommended by the Board. Therefore, under *Riverbend Farms*, any error made by the Secretary in not following the notice and comment procedure was harmless.

2. *Validity of allegedly "retroactive" assessments.*

From 1980 to 1986, the final rules establishing the annual assessments were not issued by the Secretary until at least several weeks after the beginning of the crop year. However, appellants had by that time already received a significant quantity of almonds, and the assessments were applied to those almonds as well. Appellants claim that doing so transformed the assessments into impermissible "retroactive" rules.

The Supreme Court has noted that administrative rules must be statements that have legal consequences only for the future. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217, 109 S.Ct. 468, 476, 102 L.Ed.2d 493 (1988) (Scalia, J., concurring). "Retroactive" rules—those that alter the past legal status of past actions—are "not favored in the law." *Id.* at 208, 109 S.Ct. at 471. However, they are permitted if the power to promulgate them "is conveyed by Congress *in express* terms." *Id.* (emphasis added).

We agree with the district court that even if the assessments are retroactive rules, Congress expressly granted the Secretary the power to promulgate them. The Act provides that handlers shall pay assessments for such expenses "as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him." 7 U.S.C. § 610(b)(2)(ii) (1988). Since the Order specifies the crop year to be the relevant "period," the Secretary may impose the assessment on all almonds received during that time. As the district court pointed out,

> [t]he statutory language of Section 610(b)(2)(ii) mandates that each handler's pro rata share of the Almond Board's expenses must be based on the volume of all of the commodity covered by the marketing order. The focus of the statute is on the 'expenses likely to be incurred . . . during any period specified by [the Secretary].' The period specified by the Secretary is the crop year July 1 through June 30. Therefore, the statute requires a handler to share pro rata in any expenses likely to be incurred by the Almond Board during a crop year.

We hold that even if the assessment rules are "retroactive," they are permissible because they were authorized by Congress in the Act.

3. *Statement of basis and purpose.*

Appellants contend that the final 1980-1986 assessment rules failed to comply with the substantive requirements of the APA because they did not include a "general statement of their basis and purpose" as required by 5 U.S.C. § 553(c). However, regulations with no statement of basis and purpose have been upheld where the basis and purpose was considered obvious. *See Citizens to Save Spencer County v. E.P.A.*, 600 F.2d 844, 884 (D.C.Cir.1979). This is just such a case. The "purpose" of the assessment is clearly to fund the Board's operations, and the "basis" of the rate is the mechanical application of the statutory formula. Because the basis and purpose of the assessment rate are obvious, no express statement was necessary to comply with the APA.

III. THE RESERVE REQUIREMENTS

A. *Facts and proceedings below.*

The reserve requirement is the mechanism the Board uses to regulate the volume of almonds entering the market, pursuant to the Act's goals of protecting almond prices and maintaining an orderly flow of almonds to market. 7 U.S.C. § 608c(6)(A), (C) (1988). Every year, the Board recommends to the Secretary what percentage of the total almond crop should be "salable" and what percentage should be held in "reserve" by handlers. 7 C.F.R. § 981.49 (1993). Handlers may only sell the salable percentage of almonds they receive; they must withhold from marketing an amount equal to the reserve percentage. 7 C.F.R. § 981.50 (1993). The Secretary designates the final percentage based on the Board's

recommendation and "any other available information." 7 C.F.R. § 981.47 (1993).

The almond crop year begins on July 1 and ends June 30. 7 C.F.R. § 981.19 (1993). For the 1988 crop year, the Board recommended a 25 percent reserve requirement on July 20, 1988; the Secretary issued a proposed rule incorporating this recommendation on September 16, 1988, allowing 15 days for comment; and issued the final rule establishing the 25 percent reserve requirement on January 25, 1989. For the 1990-91 crop year, the Board recommended a 35 percent reserve requirement; the Secretary issued a proposed rule on August 10, 1990, with the same 15-day comment period; and the Secretary issued the final rule on September 21, 1990.

Appellants Cal-Almond, Gourmet Packing, and Gold Hills filed administrative petitions, pursuant to 7 U.S.C. § 608c(15)(A), challenging the lawfulness of the procedures used by the Secretary to establish the 25 percent reserve requirement for the 1988-89 crop year; the validity of certain actions that the Board and Secretary require handlers to take to comply with the reserve requirement; and the validity of Secretary's imposing assessments on reserve almonds. After consolidation, the ALJ rejected most of the challenges, but held that the 1988-89 reserve and assessment rules were invalidly retroactive. On appeal, the JO upheld the Secretary's actions in all respects and the district court did the same.

Appellants Cal-Almond and Gold Hills had also filed an administrative petition challenging various USDA actions under the Order for the crop year 1990-91. The ALJ rejected their challenges and the JO affirmed. After appellants filed suit in district court,

the parties stipulated that the district court should grant summary judgment for USDA without prejudice to appellants' right to appeal, which the district court did. Appellants appeal both judgments.

B. *Discussion.*

1. *Lawfulness of 1989-90 and 1990-91 reserve obligation rules.*

(a) Retroactivity.

Appellants claim that the 1988-89 and 1990-91 reserve obligation rules were unauthorized retroactive rules. We hold that even if the rules were retroactive, they were expressly authorized by Congress and were therefore valid. *Georgetown Univ. Hosp.*, 488 U.S. at 208, 109 S.Ct. at 471-72. The Act provides that marketing orders may contain terms

> [a]llotting, or providing methods for allotting, the amount of [a] commodity . . . which each handler may market . . . under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity . . . to be marketed . . . during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

7 U.S.C. § 608c(6)(C) (1988). The focus of the statute is on the total quantity of almonds to be marketed during any period specified by the Secretary—in this case, the July 1-June 30 crop year. The statute requires the total quantity of almonds salable during

this period to be allotted "equitably" among the handlers. To do so, the Secretary has to take into account almonds shipped between the beginning of the crop year and the issuance of the final reserve rule. Thus, the reserve obligation rules, even if retroactive, are authorized by the Act.

(b) Arbitrariness.

We may set aside an agency's decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens for Clean Air v. E.P.A.*, 959 F.2d 839, 844 (9th Cir.1992) (quotation omitted). Appellants contend that the final 1988-89 reserve obligation rule was arbitrary and capricious because it was issued after undue delay. The Board recommended the 25 percent reserve obligation on July 20, 1988. The Secretary issued a proposed rule on September 16, 1988, but did not issue a final rule until January 25, 1989, over four months later, and seven months into the crop year. According to appellants, the most active times for almond sales are in late summer and early fall; consequently, appellants argue, it was arbitrary and capricious for the Secretary to have waited until well after this time had passed to issue a final reserve obligation rule.

However, appellants have cited no cases, and we have found none, holding that an agency's delay in issuing a rule makes the rule itself arbitrary or capricious. Therefore, although the delay was

certainly unfortunate and should be avoided in the future, it was not arbitrary or capricious.[14]

Appellants also contend that the 1988-89 and 1990-91 reserve obligation rules were arbitrary and capricious because they did not include a sufficient statement of basis and purpose as required by 5 U.S.C. § 553(c). We disagree. In the 1988-89 rule, USDA set out its calculations of supply and demand for California almonds and explained why a 25 percent reserve obligation was necessary:

> While this rule may restrict the amount of almonds which handlers may sell in normal domestic and expert markets, the salable and reserve percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. The reserve percentage is designed to reduce the oversupply situation in the industry in the 1988-89 crop year by holding off the market a percentage of the available almonds that could be added to an already fully supplied market. If the reserve were zero and all available California almonds were salable, almond prices, in a market which already has record supplies on hand, would be expected to drop in both domestic and foreign markets. Thus,

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[14] The cases cited by appellants address the adequacy of agency explanations of the *contents* of their rules, not the delays in promulgating them. *See, e.g., North Germany Area Council v. Federal Labor Relations Auth.*, 805 F.2d 1044 (D.C.Cir.1986); *Celcom Communications Corp. v. F.C.C.*, 789 F.2d 67 (D.C.Cir.1986).

> the Board's recommendation for a 25 percent reserve is designed to effectuate the purposes of the Act by avoiding unreasonable fluctuations in supplies and prices.

54 Fed.Reg. 3584 (1989). A similar statement was included for the 1990-91 reserve obligation rules. *See* 55 Fed.Reg. 38,793, 38,794 (1990). Both statements explain the rules' basis (almond supply and demand estimates) and purpose (avoiding unreasonable fluctuations in supplies and prices).

Furthermore, USDA addressed the primary comments on the proposed reserve obligations that were made during the 15-day notice and comment period, such as objections to the crop size estimates, demand estimates, and reserve obligation size. See 54 Fed.Reg. 3584, 3585-87 (1989); 55 Fed.Reg. 38,793, 38,794-97 (1990).[15] The rules thus satisfied the re-

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[15] The following example is illustrative:

> Many commenters who opposed the 35 percent reserve indicated that there is an over production of California almonds and that holding almonds in reserve this year will add to the surplus in following years. Over the past decade, however, annual marketable production has failed to meet trade demand needs for the 1983-84, 1985-86, 1986-87, and 1989-90 crop years. Given the wide swings in production from year to year which characterize the almond industry, it is possible that the 1991 crop could fall short of 1991-92 trade demand needs. If early projections of the 1991 crop indicate that this would likely be the case, an appropriate quantity of 1990-91 crop year reserve almonds would be released to the salable category to aug-ment 1991-92 crop year supplies.

55 Fed.Reg. 38,793, 38,794 (1990).

quirement that they "indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did." *Independent United States Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C.Cir.), *cert. denied*, 484 U.S. 819, 108 S.Ct. 76, 98 L.Ed.2d 39 (1987).

Finally, appellants claim that the reserve obligation rules were arbitrary and capricious because USDA did not follow the dictates of Departmental Regulation (DR) 1512-1 in promulgating them. We have no authority to review appellants' challenge, because section 1 of DR 1512-1 states that "[t]his directive . . . is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person." See *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir.1986) (this language evinces "clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review").

2. *1990-91 agency agreements for reserve almond disposition.*

A handler has two alternatives for disposing of reserve almonds. First, the handler may turn them over to the Board, which has the "power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable." 7 C.F.R. § 981.66(a) (1993). The Board then distributes the proceeds from such disposition to the handlers on a pro rata basis. 7 C.F.R. § 981.66(g) (1993). Alternatively, the handler may obtain authorization from the Board to act as the

Board's agent in disposing of the reserve; all agents so authorized must sign agency agreements with the Board which contain "such reasonable terms and conditions, including inspection and certification requirements, as the Board may specify". 7 C.F.R. § 981.67 (1993).

The agency agreements for the crop year 1990-91 contained a provision stating: "If established by the Secretary, minimum prices will apply to reserve almonds diverted to eligible outlets . . . Agents will be notified of any such minimum price schedule established." Appellants contend that because the agency agreements include this provision, they violate both the Act and the APA.

(a) Agency agreements and the Act.

Appellants claim that the minimum price provision violates the Act because the Act forbids the fixing of prices with respect to almonds. This is incorrect; the Act is silent regarding whether agricultural marketing orders may set the prices that handlers receive from their customers.[16] The Act does state that almond marketing orders may provide for the establishment of reserve pools of almonds and provide "for the equitable distribution of the net return derived from the sale thereof among the persons beneficially

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[16] Appellants quote our observation in *Pescosolido v. Block*, 765 F.2d 827 (9th Cir.1985), that "the Secretary is not empowered to fix prices for any [commodities other than milk] covered by the Act." *Id.* at 830. *Pescosolido* is inapplicable to the present case because it dealt with the prices that handlers pay to producers, not the prices that handlers receive from their customers.

interested therein." 7 U.S.C. § 608c(6)(E) (1988). The Almond Marketing Order further provides that "[t]he Board shall have power and authority to sell or dispose of any and all reserve almonds withheld *upon the best terms and at the highest return obtainable.*" 7 C.F.R. 981.66(a) (1993) (emphasis added). Because including minimum price provisions in agency agreements is consistent with this mandate, we hold that the agreements do not violate the Act.

(b) Agency agreements and the APA.

Appellants contend that the minimum price provision was an "additional regulation" requiring the Secretary to follow the APA's notice-and-comment procedure before adopting the agency agreements.[17] Appellants cite *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C.Cir.1987), in support of their argument. In *American Hosp. Ass'n*, the D.C. Circuit addressed the issue of whether the Department of Health and Human Services (HHS) had to subject certain of its contracts to APA notice and comment. As part of the Medicare program, HHS was required to contract with "peer review organizations" (PROs), private organizations of doctors that would monitor the professional activities of Medicare service providers in their areas. *Id.* at 1041. Con-

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[17] Agency agreements are contracts, and the APA does not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefit, or contracts." 5 U.S.C. § 553(a)(2) (1988) (emphasis added). In 1971, however, USDA promulgated a regulation making the APA's procedural requirements applicable to all of its rule making relating to contracts. 36 Fed.Reg. 13,804 (1971).

gress granted HHS great discretion to contract with each PRO as it saw fit, in order to tailor the service review process to local needs. *Id.* at 1053. The statute provided specifically that

> Contracting authority of the Secretary under this section may be carried out without regard to any provision of law relating to the making, performance, amendment or modification of contracts of the United States as the Secretary may determine to be inconsistent with the purposes of this part.

Id. (quoting 42 U.S.C. § 1320c-2(e)). The D.C. Circuit held that this statutory language exempted HHS only from "the vast corpus of laws establishing rules regarding the procurement of contracts from the government," and did not exempt HHS from the "general restraints" of the APA. *Id.* at 1054. More specifically, the language did not "restor[e] a broad exemption from all APA requirements that would allow HHS on its own to modify vitally important provisions of peer review." *Id.* The court found that since Congress had granted HHS very broad discretion to implement the peer review program through individualized contracts with PROs, the danger of HHS' "legislating" the program through contractual terms was too high unless those terms were subject to APA notice and comment. *Id.* The court concluded that "any contract provisions that are legislative are subject to § 553's notice and comment requirements." *Id.* (emphasis added).

We find the agency agreements to be distinguishable from the PRO agreements at issue in *American Hosp. Ass'n.* There, the central mechanism for implementing the entire peer review program was the PRO contracts, because Congress had mandated that HHS

enter into such a contract with a PRO in each area. Thus, there was a real danger that HHS would assume the role of unelected legislative body and promulgate statutory law under the guise of PRO contract terms. Here, by contrast, the agency agreements are incidental to the administration of the Order; they simply give handlers another, perhaps preferable, option for disposing of their reserve almonds. Unlike the program at issue in *American Hosp. Ass'n*, USDA is not required to enter into agreements with handlers, nor is any individual handler required to enter into an agreement with USDA. Because the agreements are incidental to the entire program, and because handlers have another option, there is little danger that USDA will legislate through agency agreements.

Furthermore, even if the agency agreements did raise the dangers identified in *American Hosp. Ass'n*, the only provision that appellants specifically object to—the minimum price provision—is not "legislative" and thus would not be subject to APA procedures. The Act grants the Secretary the power to "provid[e] for the equitable distribution of the net return derived from the sale [of the reserve pool] among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E) (1988). We held above that a minimum price provision is a legitimate means of enforcing this requirement; the provision is thus a "procedural" rule exempt from the APA's requirements. *See American Hosp. Ass'n*, 834 F.2d at 1055 ("procedural" rules, those that are "legitimate means of structuring [the agency's] enforcement authority," are exempt from the APA notice and comment requirement).

3. *Restrictions on handlers' disposition of reserve almonds.*

(a) Reserve almond storage requirements.

During the 1988-89 crop year, the Board informed handlers that their reserve almonds had to be stored in California. The Board instituted this requirement without following the procedural rule making requirements of the APA. Appellants argue that the California storage rule is a substantive rule that could have been promulgated only through compliance with the APA.

The Order grants the Board the power to "receive, investigate and report to the Secretary complaints of violations of [the Order]." 7 C.F.R. § 981.38 (1993). To aid the Board in exercising this power, the Order also provides that "[e]ach handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of [certain] records and for inspection and observation of almonds." 7 C.F.R. § 981.70 (1993). The California storage rule helped ensure such accessibility and was thus a "legitimate means of structuring [the agency's] enforcement authority." *American Hosp. Ass'n*, 834 F.2d at 1055. We hold that the California storage requirement, like the minimum price provision, was a "procedural" rule exempt from the APA notice-and-comment requirement.[18]

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[18] While storing almonds in California may have inconvenienced appellants, the mere fact that a rule may have a substantial impact "does not automatically transform it into a legislative rule." *State ex rel. State Water Resources Control Bd. v. Federal Energy Regulatory Comm'n*, 966 F.2d 1541, 1554 (9th Cir.1992) (quotation omitted).

(b) Future sales contracts for reserve almonds.

The Order prohibits the "handling" of reserve almonds. 7 C.F.R. § 981.50 (1993). The Order defines "to handle" as "to sell" or "to put into channels of trade." 7 C.F.R. § 981.16 (1993). In December 1988 USDA sent out a letter stating that it considered a contract for the disposition of reserve almonds entered into before the release of the reserve to be a "sale" and thus a prohibited act of "handling." Effectively, then, USDA prohibited handlers from entering into contracts to sell reserve almonds.

Appellants contend that this letter was a rule that should have been promulgated pursuant to the notice and comment requirements of the APA. However, "interpretive" rules—"those which merely clarify or explain existing law or regulations"—are exempt from these requirements. *Linoz v. Heckler*, 800 F.2d 871, 877 (9th Cir.1986) (quotation omitted); 5 U.S.C. § 553(b)(A) (1988). USDA's prohibition on the pre-release sale of reserve almonds is just such a rule, because it interprets the Order's prohibition on the handling of reserve almonds. The rule is therefore exempt from APA notice and comment.

4. *Assessments on reserve almonds.*

USDA currently imposes assessments on the total quantity of almonds received by handlers, including those in the reserve. Appellants contend that both the Act and the Order prohibit USDA from doing so.

We disagree. The Act states that each handler shall be assessed pro rata for reasonable Board expenses

> other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency *for the benefit or account of persons other than handlers subject to such order.*

7 U.S.C. § 610(b)(2)(ii) (1988) (emphasis added). Appellants argue that the Board does not dispose of the reserve almonds "for the benefit of" the handlers and that therefore the Board cannot impose assess-ments on those almonds to cover the expenses of doing so. However, the proceeds from the Board's disposition of a handler's almonds are turned over to the handler. 7 U.S.C. § 608c(6)(E) (1988); 7 C.F.R. § 981.66(g) (1993).- impose assessments on them.

We also reject appellants' contention that the Order prohibits the imposition of assessments on reserve almonds. The Order states that a handler shall only be assessed on almonds "received by him for his own account." 7 C.F.R. § 981.81(a) (1993). All reserve almonds are originally "received" by handlers for their own account, and thus subject to assessment. Only after being received by handlers are a certain percentage of almonds then "held" for the account of the Board. Even then, they are not really held for the account of the Board in the sense of the Board's receiving the proceeds from the disposition thereof, because the handlers get those proceeds. This terminology and regulatory structure is admittedly somewhat ambiguous, but "where Congressional intent is ambiguous, courts should defer to a reason-

able agency interpretation of a statutory scheme the agency is entrusted to administer." *Railway Labor Executives' Ass'n v. I.C.C.*, 958 F.2d 252, 256 (9th Cir.1991). We defer to USDA's reasonable interpretation of the Order.

IV. THE ADMINISTRATIVE REMEDY PROCEDURE

Appellants finally contend that the long and tortuous path they have had to follow to exhaust their claims violates their right to due process. While we understand appellants' frustration with the administrative remedy procedure, we must also reject their argument. Appellants claim that the procedure does not provide petitioners with a "clear and certain remedy;" however, we have already held that a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due. *Saulsbury Orchards*, 917 F.2d at 1195 (quoting *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir.1983)).[19] As for the amount of time

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[19] Contrary to appellants' contention, the Supreme Court's holding in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), does not require the remedy to consist of compensatory damages. The Court held only that an appropriate remedy for taxes unlawfully collected from plaintiff could either be a refund of taxes unlawfully collected or an assessment and collection of back taxes from the plaintiff's competitors. *Id.* at 40, 110 S.Ct. at 2252. *McKesson* never held that compensatory damages were required; it held only that a refund of unlawful taxes was one possible way for the State to satisfy the requirements of the Due Process Clause.

appellants have spent pressing their claims, we agree with the district court's reasoning that

> [w]hile there is no question that completion of the administrative process in connection with this Section 15(A) petition was very lengthy, it is also apparent that some of the delay resulted from the sheer number and magnitude of the issues raised in the petition as well as from the litigation tactics adopted by plaintiffs . . . [T]he court thinks it unrealistic of plaintiffs to expect prompt resolution of the quality and quantity of issues raised herein.

The length of the proceedings, although certainly regrettable, was not a denial of due process.

V. CONCLUSION

We affirm the judgments for USDA on all issues except the almond marketing program, which we find to violate the First Amendment. We are now faced with the question of what remedy to grant to appellants. Appellants request a full refund of the assessments imposed upon them from 1980 to the present, as well as attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Because of the fact-intensive nature of the inquiry, we find that "[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310, 106 S.Ct. 1066, 1078, 89 L.Ed.2d 232 (1986). *See also Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428

(1984). The case is remanded for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-91-064 REC

CAL-ALMOND, INC., SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., AND CARLSON FARMS, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

[Filed: June 3, 1992]

ORDER AFFIRING THE DECISION OF THE SECRETARY OF AGRICULTURE

On November 12, 1991 the court heard the cross-motions for summary judgment filed by the parties herein. More accurately, these motions constitute a review of an administrative decision.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court issues its rulings for the reasons set forth herein.

Plaintiffs Cal-Almond, Inc., Saulsbury Orchards and Almond Processing, Inc., and Carlson Farms have filed a first Amended Complaint for Review of Agency

Action under 7 U.S.C. § 608c(15)(B), Mandamus, Declaratory Relief and Reimbursement of Assessments. By this First Amended Complaint, plaintiffs seek review by this court of the final administrative action of the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (hereinafter referred to as the AMAA), 7 U.S.C. §§ 601 et. seq.[1]

A. Standard of Review.

7 U.S.C. § 608c(15) involves petitions by handlers for modification of a marketing order or an exemption therefrom. Section 608c(15)(A) provides that the handler must first petition the Secretary of Agriculture and be given an opportunity for a hearing. "After such hearing, the Secretary shall make a ruling upon the prayer of the petition which shall be final, if in accordance with law." Section 608c(15)(B) provides for review by the appropriate district court of the Secretary's ruling. "If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires."

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[1] On May 15, 1992, the parties stipulated to the dismissal of [*sic*] specified allegations in the First Amended Complaint pertaining to the takings claim. In addition, the parties stipulated that all allegations in the First Amended Complaint relating to the legitimacy of the reserves imposed for the crop years 1982 through 1985-1986 specified in the stipulation are dismissed with respect to Saulsbury Orchards and Almond Processing, Inc.

As explained in *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315-316 (3d Cir. 1968), cert. denied, 394 U.S. 929 (1969):

> The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a de novo fact finding process. It is limited to a determination of whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence. If they are, they may not be disturbed. Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Where an administrative agency disagrees with the conclusions of its ALJ, the standard does not change. The ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency. *Saavedra* v. *Donovan*, 700 F.2d 496, 498 (9th Cir. 1983). The weight accorded the ALJ's findings is greatest where credibility based on witness demeanor is at issue. However, with respect to derivative inferences, the reviewing court's deference is to the agency and not to the ALJ. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984); *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982). However, "[w]here . . . the agency deter-

minations turn on purely legal questions concerning the requirements of the applicable statutes, '[t]he questions . . . are questions of law, which we review *de novo*.' . . . . *Desir* v. *Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988), quoting *Lazo-Malano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987).

To the extent that plaintiffs challenge the Secretary's actions under the Administrative Procedure Act, the reviewing court can set aside such agency actions, findings, and conclusions as are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2)(A). "To make this finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Protect Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

B. Almond Assessments Imposed from 1980 through 1990 - Violations of the Administrative Procedure Act.

Plaintiffs assert that almond assessments imposed uponthem from 1980 through 1990 were imposed in violation of the Administrative Procedure Act.

1. Notice and Comment Requirements.

From 1980 to 1986, the United States Department of Agriculture (hereinafter referred to as the Department) published the final rule containing both the Secretary's approval of the Almond Board's proposed budget and the annual assessment rate without

first publishing a proposed rule and inviting notice and comment within the meaning and scope of the APA.[2]

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[2] The rule making required by the APA is set forth in 5 U.S.C. § 553:

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved -
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> . . .
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
>
> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law . . . .
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> . . .
>
> Except when notice or hearing is required by statute, this subsection does not apply -
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> . . .
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

A "rule" for purposes of the APA is defined in Section 551(4) as follows:

> [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe the law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of

a. Discretionary.

The Department contends that the rule-making provisions of the APA do not apply at all because the Secretary's decision whether to approve the annual budget proposed by the Almond Board is entirely discretionary.

The court, however, concludes that the appropriate analysis is, as was utilized during the administrative proceeding, whether the budget approval process is exempted from the rulemaking requirement as rules of "agency organization, procedure or practice, within the meaning of 7 U.S.C. § 553(a)(2).[3] The ALJ", citing *Batterton v. Marshall, supra,* 648 F.2d at 707-708, held that the exception for "agency organization, procedure or practice" cannot apply where the agency action affects substantial private rights and interests:

> The budget process required by the Order is not analogous to the Department's internal budget process. Significantly, the internal budgets of the Department do not involve assessments. The assessments required to be paid by handlers [have] a substantial impact upon their private rights and interests and, therefore, the handlers should have been afforded an opportunity to participate in the rulemaking process by notice and comment.

However, in reversing the ALJ on this issue, the Judicial Officer quoted extensively from his decision in *In re Wileman Bros. & Elliott, Inc. (Wileman I)*

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valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

[3] The ALJ's Initial Decision actually makes reference to 7 U.S.C. § 553(b)(B), but this clearly is a typographical error.

and relied upon it in ruling that the Secretary is not required to promulgate the assessments by notice-and-comment rulemaking, a reliance the court finds to be well-taken. In *Wileman I*, in the course of affirming that ALJ's decision that notice-and-comment rulemaking is not required for the Secretary's approval of any of the Nectarine and Plum Committees' expenses, the Judicial Officer ruled in pertinent part:

> I have not been convinced that budget approval by the Secretary is something that is required to be accomplished through rule making under the [AMAA]. There is no requirement in that statute that the Secretary employ notice and comment for Committees' budgets[15] and any such requirement

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[15] The Secretary's right to approve the budgets of the Committees without notice and comment rulemaking is the same as his right to approve, without notice and comment rulemaking, the budgets of his other agencies, such as the Office of Administrative Law Judges, the Office of the General Counsel, the Agricultural Marketing Service, its Fruit and Vegetable Division, or its Marketing Order Administration Branch.

> would have to be forthcoming from the provisions of the [APA], or, partake of a 'taxing' function, which would be beyond the scope of the Secretary's powers. It is true that the budgets of these Committees' (and other USDA agencies whose budgets are approved by the Secretary without notice and comment rulemaking] affect payments from others, whether they be general taxpayers, fruit handlers, or recipients of some other fee-based Government service. But in all cases this

> ultimately is a case of Secretarial discretion in approving the expenses of the Committees which *in themselves* impose no direct financial requirements on others. The Secretary is not forbidden from seeking further public input through a Federal Register publication regarding the budget of the Committees (or any of the Secretary's agencies] and . . . has done so on some isolated occasions. Much more typically, however, he has merely announced that the budget and certain expenditures of the Committees [or other agencies] have been approved and authorized. The key legal point, however, is that there is not requirement in law that the Secretary seek notice and comment regarding such budget authorization.

b. Good Cause.

The Secretary further argues that there was good cause within the meaning of 5 U.S.C. § 553(b)(B) to dispense with notice-and-comment rulemaking with respect to the annual assessment rates. The ALJ at pp. 72-74 did not agree. However, the Judicial Officer reversed the ALJ at pp. 132-152.

The Almond Board is required to submit a budget of its anticipated expenses for the crop year beginning July 1 to the Secretary for approval on or before August 1. 7 C.F.R. § 981.80. The final rule published in the Federal Register for the crop year 1980-1981 stated that notice-and-comment rulemaking was not necessary:[4]

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[4] A similar statement was published with the final rules for 1981-1986. For the 1987 crop year and thereafter, the Secretary has issued proposed and final rules concerning

> It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking and postpone the effective time until 30 days after publication in the Federal Register (5 U.S.C. 553), as the order requires that the rate of assessment for a particular crop year shall apply to all assessable almonds handled from the beginning of such year which began July 1, 1980. To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expenses and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the act it is necessary to make these provisions as specified.

The Secretary bears the burden of demonstrating good cause under Section 553(b)(B). *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987). "The notice and comment procedures in Section 553 should be waived only when delay would do real harm.' .... The good cause exception is essentially an emergency procedure." *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). As further explained in *Northern Arapahoe Tribe, id.*:

> The legislative history further defines the grounds for an agency to find good cause:
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> > "'*Impracticable*" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by

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assessments pursuant to the notice-and-comment provisions of the APA.

> its undertaking public rule-making proceedings. "*Unnecessary*" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "*Public interest*" supplements the terms "impracticable" or "unnecessary;" it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.'
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> . . . The exception should be narrowly construed because '[i]t is an important safety valve to be used *where delay would do real harm.* It should not be used, howver [sic], to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them.' . . . Section 553 is designed to give affected parties an opportunity to participate in agency decisionmaking early in the process, when the agency is more likely to consider alternative ideas . . . .

Here, the Secretary argues that the opportunity for comment provided during the public meetings of the Almond Board in July makes notice-and-comment rulemaking unnecessary. The Almond Board holds open meetings in July of each year and prepares its recommendations concerning its proposed expenses and its proposed annual assessment rate. During these meetings, the Board receives comments and testimony from any interested parties. After deciding on its recommendations to be made to the Secretary, the Almond Board directly notifies each handler

of the assessment rate being proposed for that year. From the 1980 to 1986, the assessment rate set forth in the final rule issued by the Secretary was exactly the same as the assessment rate proposed by the Almond Board. Defendant further argues that because the Almond Board's annual harvest forecast and proposed budget both depend on crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the rule until 30 days after publication.

The court agrees with defendant that the time frame of budget proposal and determination of anticipated crop yields and expenses cannot be readily pushed back thereby establishing good cause for non-compliance with the APA. Moreover, even were the court to conclude to the contrary, the court is persuaded by the analysis in *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487-1488 (9th Cir. 1992), that the failure is harmless error.

c. Statutorily Required Calculation.

The court further concurs with the Judicial Officer that compliance with the notice-and-comment requirements of the APA are unnecessary because the annual assessment rate is determined by the statutorily required calculation set forth in 7 U.S.C. § 610(b)(2)(ii). Because of the mechanical nature of the calculation, it does not constitute the kind of legislative rulemaking that should be subject to notice and comment.

2. Retroactive Assessments.

During the crop years 1980 through 1990, the final rules imposing the assessments against handlers pursuant to the AMAA and the Almond Marketing Order were not published by the Secretary until some weeks following the beginning of the crop year on July 1.[5]

Plaintiffs argue that this is impermissible retroactive rulemaking within the scope of *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208-209 (1988).[6]

The court does not agree. "While *Bowen* does create a presumption of statutory construction against retroactive rulemaking, it does not establish an absolute prohibition against such rulemaking. *Bowen*, nevertheless, does send a clear signal that agencies and courts must find congressional authorization for retroactive rulemaking in the particular law they are construing." *GMC v. National Highway Traffic Safety Admin.*, 898 F.2d 165, 169 (D.C. Cir. 1990). Here, the court is persuaded that the requisite congressional authorization is present in 7 U.S.C. § 610(b)(2)(ii) and in the Recommended De-

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[5] For the crop year 1980, the final rule was issued on August 26, 1980, for the crop year 1981, the final rule was issued on September 24, 1981. For the following crop years the final rules were issued by the Secretary on October 5, 1983, September 27, 1984, September 9, 1985, October 17, 1986, December 1, 1987, October 3, 1988, November 6, 1989, and September 6, 1990.

[6] The ALJ so ruled at pp. 74-79. The Judicial Officer reversed the ALJ at pp. 152-166.

cision issued by the Secretary in 1950 when the Almond Marketing Order was issued.

The statutory language of Section 610(b)(2)(ii) mandates that each handler's pro rata share of the Almond Board's expenses must be based on the volume of all of the commodity covered by the marketing order. The focus of the statute is on the "expenses likely to be incurred . . . during any period specified by [the Secretary]." The period specified by the Secretary is the crop year July 1 through June 30. Therefore, the statute requires a handler to share pro rata in any expenses likely to be incurred by the Almond Board during a crop year. The fact that the actual amount of the expenses and the rate of assessment are not in place by final rule on July 1 does not, in the court's judgment, make a later final rule retroactive and does not change anything in terms of what a handler is going to be required to pay.

3. Final Rules.

a. 1980-1986 Crop Years.

Plaintiffs argue that the final rules issued by the Secretary setting forth the Almond Board's budget and assessment rate for the 1980 through 1986 crop years are arbitrary and capricious and thus violative of the APA.

In so arguing, plaintiffs note that the final rule imposing the assessment rate for the crop years in question amounted to a single paragraph stating that expenses of a certain amount are authorized and fixing a certain assessment rate, less any amount credited pursuant to the advertising regulations, not to exceed two and one half cents per pound. Plaintiffs contend that the APA requires that the reason or rationale for the final rule must be set forth by the

Secretary or the final rule is automatically arbitrary and capricious.

However, case law does not necessarily support such a draconian result. As explained in *Alabama Association of Insurance Agents v. Board of Governors of Federal Reserve System*, 533 F.2d 224, 236-237 (5th Cir. 1976), *modified on other grounds*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978):

> The APA provision 'does not require the agency to supply specific and detailed findings and conclusions of the kind customarily associated with formal proceedings', but this limitation does not lessen or excuse the agency's obligation to publish a statement of reasons that will be sufficiently detailed to permit judicial review.' . . . .
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> This statutory requirement, however, has not been enforced with vigor that would, at first blush, seem indicated. Statements with no more informative content than the one before us have been held to pass muster . . . And regulations with no statement of basis and purpose at all have been upheld where the court deemed the basis and purpose obvious . . . .
>
> The rationale of these decisions is not difficult to ascertain. Courts must have an adequate basis to engage in judicial review, but, as partners with the agencies in the effectuation of Congressional will through the administrative process, they do not function to strike down agency action because of merely formal or technical flaws . . . For this reason, a court must examine not only whether an agency's promulgation of a challenged regulation complies with the procedural requirement; it must

> also determine whether, in light of the nature and content of the regulation and of the underlying legislation, the extraneous material which may be available to explain the basis and purpose of the agency action, and the quantum of action taken in reliance on the regulation, any procedural flaw so subverts the process of judicial review that invalidation of the regulation is warranted.

Furthermore, the court is referred by the Department to the legislative history of the Food Security Act of 1985, discussing procedural changes to the AMAA allowing the Secretary to approve reasonable requests for marketing order committees to utilize outside counsel in rulemaking proceedings where the Office of General Counsel of the Department of Agriculture lacks sufficient staff with the necessary specialized expertise and allowing each amendment to a marketing order to be voted on individually in a referendum and marketing orders to continue in effect even if one or more of the amendments loses in the referendum. House Report No. 99-271, Part 1, which is the report of the Committee on Agriculture, states in pertinent part as follows:

> The Committee restates its support for marketing orders and agreements as set forth in the [AMAA], as amended. The Committee supports the authority conferred upon the Secretary to establish and maintain orderly marketing conditions for any agricultural commodity enumerated in Section 8c(2). This authority provides for the continuation of marketing orders to avoid unreasonable fluctuations in supplies and prices detrimental to consumers and producers when the price of a regulated commodity exceeds parity . . . .

> Historically, Marketing Order Administrative Committees, comprised of producer, handler, and consumer representatives appointed by the Secretary, have been instrumental in recommending regulations necessary to maintain orderly market conditions. In large measure, the Administrative Committees help to ensure that commodity supplies achieve specified quality standards in a regular flow established through marketing quotas. The Committee encourages the cooperation of the Secretary with designated Administrative Committees. To the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the [AMAA], and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of the industry in how to best to market a crop.

H.R. 99-271, Part I, p. 193, *reprinted in* 1985 U.S.C.C.A.N. 1103, 1297.

Here, the Almond Board transmitted to the Secretary the records of its deliberations, which records include the dissenting and minority viewpoints expressed at the Almond Board public meetings, to the Secretary with its recommendations concerning the proposed budgets. This belies plaintiffs' assertion that was without any information from the opponents of the Almond Board's various recommendations in the absence of public comment. Moreover, as the Department further notes, because the amount of the annual assessments are arrived at through an entirely mechanical process which is dictated by statute, the basis and purpose of the Secretary's decision with respect to the annual assessment rate

is clear from the statutory scheme. The court does not find persuasive plaintiffs' contention that the basis and purpose for the Secretary's decision is not clear because the of the absence of public comment. In the court's opinion, the Secretary's actions in issuing the final rules for the years in question as worded does not violate the APA. See *Riverbend Farms, Inc. v. Madigan, supra*, 958 F.2d at 1488.

b. 1987-1990 Crop Years.

Plaintiffs further challenge the final rules issued for the 1987-1990 crop years on the ground that the Secretary did not provide any detailed analysis why the advertising assessment was necessary for the sale of the almond crop nor why compelling handlers to advertise pursuant to the regulations set forth in 7 C.F.R. § 981.441 would carry out the purpose of selling more almonds. Plaintiffs assert that the statements in the final rules for these years that the advertising assessments are necessary are conclusions entitled to no weight by this court because of the Secretary's failure to provide a detailed rationale.

Again, however, case law does not necessarily support this result. As noted above, because the basis and purpose for the rule can be determined, the rule can be upheld.

C. Creditable Advertising Assessments.

1. Regulatory Conflict with Statute.

Plaintiffs argue that the creditable advertising regulations contained in 7 C.F.R. § 981.444, captioned "Crediting for marketing promotion including paid advertising", promulgated pursuant to 7 U.S.C. § 608c(6)(I), directly conflict with the prohibition on the regulation of advertising set forth in 7 U.S.C.

§ 608c(10). Therefore, because an agency action must be set aside if it is in excess of statutory jurisdiction, or limitations, or short of statutory right", *Baltimore Gas and Electric Company v. Natural Resource Defense Counsel*, 462 U.S. 87, 105 (1983), plaintiffs argue that the assessments must be set aside. Plaintiffs contend that Congress, when it enacted Section 608c(6)(I), was "merely telling the Secretary that the marketing order can contain advertising and promotional concepts, handlers can be assessed to fund that program, but if handlers desire to engage in their own advertising and promotion to sell almonds, they can receive credit for that -- but without restrictions, prohibitions or regulations concerning how, in what medium, at where the advertisements are placed, or to what market the advertisements and promotions are directed."

There are two relevant statutory provisions involving advertising in the AMAA.

Section 608c(6)(I), enacted in 1970 as part of P.L. No. 91-522, 84 Stat. 1357, provides in pertinent part:

> [Marketing] orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:
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> . . .
>
> (I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds

> collected pursuant to the marketing order: *Provided*, that with respect to orders applicable to almonds . . . , such projects may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . .

However, Section 608c(10), enacted in 1935 as part of P.L. No. 320, 49 Stat. 750, 758, provides in pertinent part that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereof, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement."

The ALJ agreed with plaintiffs that the regulation conflicted with the statute. The ALJ, however, was reversed by the Judicial Officer.

In the court's opinion, the Judicial Officer is correct. The creditable advertising regulations do not regulate the handler's advertising but only the handler's ability to receive credit for the advertising against the assessment. In other words, the handler is otherwise free to advertise in any manner they choose.

Plaintiffs' premise that handlers are entitled to receive credit for all of their advertising expenditures is not supported by the AMAA. The AMAA itself provides undisputed authority that handlers may be assessed without providing an opportunity for a credit. Moreover, the Almond Marketing Order did not provide for an advertising credit from 1950 to

1970. Finally, when Congress provided that advertising expenditures could be credited against annual expenditures, there was no guarantee that every handler would be able to reduce his assessment by the full amount of the allowable credit.

Furthermore, the Department's interpretation of Congressional intent as expressed in the creditable advertising regulations is reasonable given that Congress was aware of the prohibition in Section 608c(10) against regulating advertising when Congress amended the AMAA to enact Section 608c(6)(I) to permit creditable advertising. As the Department contends, if the statutory prohibition on the regulation of advertising is construed to mean that no guidelines or conditions may be established for the receipt of advertising credit, Congress' intent in establishing the creditable advertising program for almonds that such credits be available only for advertisements likely to benefit the industry would be frustrated. A court must presume that Congress acts with deliberation, rather than by inadvertence, when it drafts a statute. *United States v. Motamedi*, 767 F. 1403, 1406 (9th Cir. 1985). Where two statutes are "'"capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

2. First Amendment.

The ALJ and the Judicial officer identically ruled that the creditable advertising regulations do not violate plaintiffs' First Amendment rights. The court concurs with these opinions.

The court concludes that the creditable advertising assessments do not implicate First Amendment rights because plaintiffs are not "compelled" to advertise. Section 608c(6)(I) authorizes marketing orders to provide for "production research [and] marketing research and development projects," including "projects . . . provid[ing] for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order. . . . . ." The Almond Marketing Order contains regulations, duly promulgated through formal on-the-record rulemaking, which authorize the Almond Board to establish market development projects including paid advertising, 7 C.F.R. § 981.14, to credit a portion of a handler's direct expenditures for market promotion, including paid advertising, for the sale of almonds, and to prescribe appropriate rules and regulations as are necessary to effectively regulate the crediting of the pro rata expense assessment of handlers, 7 C.F.R. § 981.41(c). The regulations do not permit plaintiffs to receive a credit against their annual assessment unless their advertising complies with the regulations regarding creditable advertising, but do not compel plaintiffs to participate in the advertising because plaintiffs are otherwise free to engage in any advertising they wish without interference with the Almond Board. As the Department argues, however, the Board is not obligated to subsidize any and all advertising that plaintiffs choose to engage in.

D. Unlawful Delegation of Judicial or Legislative Authority

Plaintiffs argue that 7 C.F.R. § 981.441, as applied, constitutes an unlawful delegation of authority because it permits the Almond Board, made up of plaintiffs' competitors, to decide what constitutes creditable advertising under the terms of the Marketing Order.

The non-delegation doctrine has its roots in the separation of powers principle underlying our tripartite system of government. "[T]he integrity and maintenance of the system of government ordained by the Constitution" preclude Congress from delegating its legislative power to either the Executive or Judicial Branches. *Field v. Clark*, 143 U.S. 649, 692 (1892). In *Mistretta v. United States*, 468 U.S. 361, 371-373 (1989), the Supreme Court reiterated:

> We also have recognized, however, that the separation-of-powers principle, and the non-delegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach ot [sic] such cooperative ventures: 'In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination.' . . . So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform,

> such legislative action is not a forbidden delegation of legislative power.' . . . .
>
> Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under general directives . . . Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'

As noted in *National Federation of Federal Employees v. United States*, 905 F.2d 400, 404 (D.C. Cir. 1990), the "intelligible prinicple" [sic] test has not been a tough one. The Supreme Court has not invalidated legislation on non-delegation grounds in over fifty years. Moreover, "[o]nly the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." *Humphrey v. Baker*, 848 F.2d 211, (D.D. [sic] Cir.), *cert. denied*, 488 U.S. 966 (1988).

Plaintiffs refer the court to *Carter v. Carter Coal Company*, 298 U.S. 238, 311 (1938). However, as noted in *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990), the bar of delegation of "law-making" to competitors expressed in *Carter* has not been applied in modern cases. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *United States v. Frame*, 885 F.2d 1119, 1128-1129 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094

(1990); *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

The Almond Marketing Order's advertising regulations do not constitute an unconstitutional delegation under Carter or other standards articulated by the Supreme Court. The Almond Board staff makes the initial determination as to whether a proposed advertisement is creditable in accordance with regulations set forth in 7 C.F.R. § 981.441. These regulations were adopted pursuant to formal rulemaking procedures. A determination that a particular advertisement is not creditable under the regulations may be appealed to the Public Relations and Advertising Committee of the Almond Board, then to the Almond Board, and finally, to the Secretary.

Plaintiffs attempt to argue around this sequence of events by arguing that an advertisement that is approved for credit is not reviewed by the Secretary. However, this is a distinction without relevance to the issue before the court, if an advertisement has been approved for credit, it was so approved because it complied with the regulation, a regulation that was promulgated by the Secretary through the formal rulemaking process.

Plaintiffs further argue that the fact of the administrative appeal remedy is beside the point because the appeal may take many years. In so arguing, plaintiffs refer the court to *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965). *Freedman* has nothing to do with the unconstitutional delegation issue raised by plaintiffs. *Freedman* holds that a noncriminal process requiring prior submission of a film to a censor avoids violation of the First Amendment freedom of expression only with procedural

safeguards designed to eliminate the dangers of censorship.

Therefore, the court concludes that the creditable advertising regulations do not constitute an unlawful delegation of authority as argued by plaintiffs. There is sufficient oversight available under the law to withstand this constitutional challenge.

E. Assessments on Reserves.

Plaintiffs' argue that the ruling of the Judicial Officer that handlers may be assessed for almonds held in reserve is contrary to law.

7 U.S.C. § 610(b)(2)(ii) provides in pertinent part:

> Each [marketing] order relating to any other commodity or product [other than milk] issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, *other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order* . . . .

[Emphasis added]. 7 C.F.R. § 981-81(a) provides that a handler must pay an assessment on almonds "received by him for his own account." "Almonds received for his own account" is defined in 7 C.F.R. § 981.10 to mean "all almonds which are received by a handler (including all almonds of his own production) except those that are received by him for storage or processing for the account of any other person and with respect to which such handler performs no handling function." 7 C.F.R. § 981.50 provides in pertinent part that "[w]henever salable and reserve percentages are in effect for a crop year, each handler shall withhold from handling a quantity of almonds having a kernal weight equal to the reserve percentage of all almonds each handler receives for his own account during the crop year . . . The quantity of almonds hereby required to be withheld from handling shall constitute, and may be referred to as the 'reserve' or 'reserve obligation' of a handler . . . ." 7 C.F.R. § 981.51 provides in pertinent part:

> Each handler may satisfy his reserve obligation with such almonds specified in the terms of the agency agreement authorized in § 981.67 . . . Any handler who does not become an agent may receive credit by similarly delivering almonds to the Board or its designees . . . .

7 C.F.R. § 981.52 provides in pertinent part that "[e]ach handler shall, at all times, hold in his possession or under his control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation less: (a) Any quantity which was disposed of by him pursuant to § 981-67; and (b) any quantity for which he is other-

wise relieved by the Board of responsibility to so hold almonds."

Plaintiffs argue that the proper interpretation of these provisions is that the handler cannot be assessed for reserve almonds because they are not being held for the handler's account, but for the account of the Board or some other third party.

However, as defendant responds, plaintiffs are not reading the entire Almond Order in context. Thus, defendant argues:

> Before a handler can assign almonds to his reserve obligation, he must first receive them, thus activating the assessment provision . . . which requires [handlers] to then hold his reserve almonds 'for the account of the Board.' 7 C.F.R. 981.52. Therefore, the assessment is not on the almonds held for the account of the Board, but on almonds received by the handler (which may *subsequently* be held for the account of the Board).

Moreover, this is defendant's long-standing interpretation. As explained in *United States v. 313.34 Acres of Land*, 925 F.2d 698, 701 (9th Cir. 1991):

> While we recognize that 'the judiciary is the final arbiter of issues of statutory construction, an administrative agency's interpretation of a statute it is charged with administering is accorded substantial deference.' . . . We thus stress the limited nature of our review of the Service's interpretation of the statutory language. '[W]e should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' . . . .

> The interpretation given a statute by an agency need not represent the only permissible reading of the statutory language, or the 'best', reading, or the reading the court might have given the statute had the issue been considered initially in a judicial proceeding . . . Instead, the agency's interpretation of the statutory language need only be 'based on a permissible construction of the statute.' . . . To prevail, then, the Kemps must demonstrate that the Service's interpretation finds no reasonable support in the text of the Act or its legislative history.

In addition, the term "for the account of the Board" is defined differently than the term "almonds received for his own account", meaning the handler's account. Section 981.52 provides that "[u]pon demand of the Board reserve almonds shall be delivered to the Board f.o.b. handler's warehouse or point of storage, except that the Board shall not make such demand upon a handler with respect to reserve almonds for which he has agreed to undertake disposition pursuant to § 981.67." This provision means that the handlers are required to account to the Board for the disposition of the reserves, but the proceeds are those of the grower and the handler, not the Board. The proceeds of the sale of reserve almonds held for the account of a third person such as another handler belong to that handler.

Furthermore, even if the Board were to take possession of a handler's almonds and disposes of them, the Board is required by statute to "provide for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E). Therefore,

as defendant contends, the handler does not sacrifice his beneficial interest in his reserve almonds when he holds them "for the account of the Board."

Finally, plaintiffs' argument is contrary to the basic purposes of the AMAA. As pointed out by defendant the Almond Order provides that the "Board shall have power and authority to sell or dispose of any and all almond reserves . . .", 7 C.F.R. § 981.66. As contended by defendant, it is "nonsensical to suggest that Congress gave the administrative committees power over reserve pools but deprived them of any means of financing the execution of that duty."

F. Market Development/Almond Butter Program.

1. Imposition of Allocated Reserve from 1982 through 1985-1986 Crop Year.

Plaintiffs argue that the ALJ's conclusion adopted by the Judicial Officer that there was a rational basis in the rule-making record for the imposition of a reserve to be set aside by handlers in connection with the market development/almond butter program.

The proposed rule issued by the Secretary and published in the Federal Register on August 27, 1982 was based on the unanimous recommendation of the Almond Board. The final rule was published in the Federal Register following the receipt of one comment.

a. Authority to Impose Reserves.

Plaintiffs argue that relevant statutes and regulations only provide the Secretary with authority to establish reserves for "orderly marketing". Plaintiffs contend that there is no suggestion in these statutes and regulations that the Secretary can establish reserves solely for the purpose of selling

agricultural products at a cheap price and for a specific end use like almond butter.

The court does not agree with plaintiffs' ultra-narrow construction of the pertinent provisions nor does the court agree with their skewed characterization of the purpose of these reserves.

The Almond Marketing Order authorizes the Secretary to designate reserves whenever he finds that such reserves "would tend to effectuate the declared policy of the [AMAA]." 7 C.F.R. § 981.47. 7 U.S.C. § 608c(6) provides that marketing orders shall contain one or more of the following terms and conditions and "no others". The terms and conditions set forth in Section 608c(6)(C)-(E) are as follows:

> (C) Allotting, or providing methods for allotting, the amount of any such commodity . . . which such handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity . . . under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity . . . to be marketed in or transported to any or all markets . . . during any specified period or periods shall be equitably apportioned among all of the handlers thereof.
>
> (D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity . . . and providing for the control and disposition of such surplus, and

> for equalizing the burden of such surplus elimination or control among producers and handlers thereof.
>
> (E) Establishing or providing for the establishment of reserve pools of any such commodity . . . and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

7 U.S.C. § 602 sets forth the declared policy of Congress with respect to the AMAA. Section 602(1) states that it is the policy of Congress "to establish and maintain such orderly marketing conditions for agricultural commodities . . . as will establish, as the prices to farmers, parity prices . . . ." Section 602(2) states that it is also the policy of Congress "[t]o protect the interest of the consumer" by approaching the level of parity prices and by authorizing no action which has the purpose of maintaining prices for farmers above parity. Section 602(3) states that it is also the policy of Congress "to establish and maintain such production research, marketing research, and development projects provided in Section 608c(6)(I) . . . as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." Section 602(4) states that it is the policy of Congress "to establish and maintain such orderly marketing conditions . . . as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." Section 602(5) states that it is the policy of Congress "to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to

avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter."

As explained in *United States v. 313.34 Acres of Land*, 925 F.2d 698, 701 (9th Cir. 1991):

> While we recognize that 'the judiciary is the final arbiter of issues of statutory construction, an administrative agency's interpretation of a statute it is charged with administering is accorded substantial deference.' . . . We thus stress the limited nature of our review of the Service's interpretation of the statutory language. '[W]e should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' . . . .
>
> The interpretation given a statute by an agency need not represent the only permissible reading of the statutory language, or the best, reading, or the reading the court might have given the statute had the issue been considered initially in a judicial proceeding . . . Instead, the agency's interpretation of the statutory language need only be 'based on a permissible construction of the statute.' . . . To prevail, then, the Kemps must demonstrate that the Service's interpretation finds no reasonable support in the text of the Act or its legislative history.

In the court's opinion, plaintiffs have not carried this burden of proof. To the court, a reserve program

designed to develop new markets must be included within the concept of an "orderly market". What other purpose could there be for the statutory provision for assessments for market development and product advertising? Other than referring the court to the statutes and regulations quoted above plaintiffs have presented no analysis of the statutory definition or of any legislative history to support what the court is persuaded is an incorrect interpretation.

b. Rational Basis.

Plaintiffs further argue that there was no rational basis for the Secretary's decision to impose the reserve in order to develop the almond butter market and that, therefore, the final rule doing so was arbitrary and capricious within the meaning of the APA. In resolving this issue, the court does not weigh the evidence before the Secretary. The court merely examines the record to see if there is evidence, which if accepted by the Secretary, supports the determination of the agency. The court is then bound by the arbitrary and capricious test. National *Soft Drink Ass'n v. Block*, 721 F.2d 1348, 1354 (D.C. Cir. 1983).

In arguing that the final rule was arbitrary and capricious, plaintiffs make the remarkable statement that it does not matter that for each of the years in which the Secretary approved the existence of a reserve market development program, the Secretary reviewed transcripts of meetings, minutes, reports from the Agricultural Marketing Service field agent and various other documents including resolutions, correspondence among industry members, and recommendations from handlers, all which, as well as the

rules themselves, are replete with support for a reserve to help create a market for almond butter. Rather, plaintiffs rely on their argument discussed immediately above that the Secretary did not have the authority to impose the reserves for a specific use. As stated above, in the court's opinion, plaintiffs' argu-ment is without merit.

Plaintiffs also argue that the almond butter reserve program was arbitrary and capricious because the Secretary stated in the final rule issued for the 1982 crop year that "[t]o insure success with this project, the Board believes that initially it is necessary to keep almond butter competitive with peanut butter, which currently dominates the market." The Secretary then stated:

> While the 2% reserve will limit the supply of almonds available to normal markets to a small extent it is not expected to have any effect on grower and consumer prices in 1982-83.

Plaintiffs contend:

> While the Secretary is saying, on the one hand, that almonds sold into almond butter will bring a lower price so that the almond butter can be competitive with peanut butter, the Secretary inconsistently states on the other hand that the 2% reserve for almond butter will have no affect on grower prices for that crop year. Such a statement is inconsistent (and thus arbitrary) on its face. If handlers could otherwise receive more money selling their almonds in the open market than they could selling it into almond butter, then the grower returns would be reduced by their almonds being forced into almond butter.

However, as the Department responds, the two statements by the Secretary in the final rule quoted above are not inconsistent because "[w]hile it may be true that the 2% reserve incrementally reduced 'grower returns' in the 1982-83 crop year, it is also true that a 2% reserve would not be expected to increase the prices of almonds." The "inconsistency" relied upon by plaintiffs is not relevant because the Secretary has the authority under the AMAA to impose a reserve even if prices are affected in order to maintain parity prices.

Plaintiffs further argues that "[w]hile it may be true that the Secretary has the authority to set a reserve requirement when the production exceeds the trade demand (factoring in the desirable carry over, etc.) in order to fulfill its obligations to the declared policy of congress (see 7 C.F.R. §§ 981.47 and 981.49), . . . neither the Almond Marketing Order nor the AMAA permits the Secretary to issue a reserve when it does not otherwise satisfy the reserve criteria set forth in § 981.49 and § 981.47 of the Almond Marketing Order, or satisfy the orderly marketing criteria' of the AMAA."

The point of this argument is that an Agricultural Marketing Service official stated to the Secretary in a document forwarded to the Secretary following the Almond Board's unanimous recommendation that the 2% reserve be imposed that "Obviously a 2% reserve not supply management in any sense, but such establishment is necessary to give the industry an opportunity, on a uniform basis, to develop an almond butter market." Plaintiffs flatly state that "[t]his reason alone violates the AMAA."

7 C.F.R. § 981.47 is captioned "Method of establishing salable and reserve percentages" and provides in pertinent part:

> Whenever the Secretary finds, from the recommendations and supporting information supplied by the Board or from any other available information, that to designate the percentages of almonds during any crop year which shall be salable almonds and reserve almonds would tend to effectuate the declared policy of the act, he shall designate such percentages. Except as provided in § 981.50 the salable and reserve percentages shall each be applied to the kernal weight of almonds received by a handler for his own account during the crop year. In establishing such salable and reserve percentages, the Secretary shall give consideration to the ratio of estimated trade demand (either domestic or domestic plus export, less the handler carryover available to satisfy trade demand plus the desirable handler carryover at the end of the crop year) to the estimated production of marketable almonds (all expressed in terms of kernal weight) or the allocation quantity (marketable production plus almonds diverted to oil or feed when eligible for reserve satisfaction) whichever is applicable; the recommendation submitted to him by the Board; and such other information as he deems appropriate. The total of the salable and reserve percentages established each crop year shall equal 100 percent.

7 C.F.R. § 981.49 is captioned "Board estimates and recommendations" and provides in pertinent part:

> To aid the Secretary in fixing the salable and reserve percentages, the Board shall furnish to the

Secretary, not later than August 1, the follow-ing estimates (kernal weight basis) and recommendations for the crop year, each of which, or any later revisions thereof, shall be adopted by the affirmative vote of at least six members:

(a) The quantity of marketable almonds to be produced;

(b) The handler carryover and the reserve inventory as of July 1;

(c) The desirable handler carryover and the probable reserve inventory at the end of the crop year;

(d) The trade demand, taking into consideration anticipated imports, economic conditions and the anticipated market price (within the limitations of the act);

(e) The recommended salable and reserve percentages to be established; and

(f) The recommended percentage of reserve almonds that may be exported pursuant to § 981.66.

The Board shall also furnish to the Secretary a complete report of the proceedings of the Board meeting at which the recommended salable and reserve percentages were considered. If, for any reason, the Board fails to make these estimates or to recommend to the Secretary salable and reserve percentages as required hereby, reports representing the views of members with respect to such matters may be submitted to the Secretary who may act on the basis of such reports or other information available to him.

As the Department points out, neither of these regulations impose absolute limits on the Secretary's power to establish a reserve. These regulations articulate criteria which should be considered by the Secretary in deciding whether or not to establish a reserve. However, the Secretary is fully empowered to establish reserves which do not satisfy these criteria so long as the Secretary finds "that to designate the percentages of almonds during any crop year which shall be salable and reserve almonds would tend to effectuate the declared policy of the act . . . ."

Plaintiffs further argue to some length and in some detail that the almond butter reserve requirements imposed for the years at issue were arbitrary and capricious because, according to plaintiffs' calculations, trade demand exceeded supply for each of those years.

However, as concluded by the Judicial Officer, plaintiffs' calculations of supply and demand totally omit "carryover almonds" from the previous crop year. When the carryover almonds are considered, the reserves established for 1982-1986 match the anticipated surpluses very closely. For the 1983-1984 crop year, a 3% reserve was imposed. Plaintiffs state that the establishment of this reserve for the almond butter marketing development program was arbitrary and capricious because the Secretary did not foreclose the sale of the reserve almonds as cattle feed.

In so arguing, plaintiffs refer the court to 7 C.F.R. § 981.66(c). Section 981.66 is captioned "Conditions governing disposition of reserve." Section 981.66(a) provides that "[t]he Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable consistent with the

ultimate complete disposition of reserve, subject to all conditions of this section." Section 981.66(c), captioned "exclusion from salable normal trade channels", provides:

> No reserve almonds shall be sold in the United States, Puerto Rico, and the Canal Zone other than to governmental agencies or to charitable institutions for charitable purposes, except for diversion into almond oil, almond butter, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds, and with proper safeguards in each case to prevent such almonds thereafter entering the channels of trade in such normal markets.

Plaintiffs have mischaracterized the final rule establishing these reserves. The final rules did not establish any specific percentages of the reserves to be allocated to almond butter or school lunch programs or any other outlets allowed by the Marketing Order. Rather, the rules establishing the reserves from 1982 to 1985-1986 provided that the reserve almonds could be sold into any noncompetitive outlet. It was the agency agreements which set forth the specific percentage limitations for the disposition of the reserve almonds.

Plaintiffs further argue that the rules establishing the reserves were contrary to law because the Secretary did not state how much of the reserves were planned to be allocated to the almond butter development program and the school lunch programs. In arguing that the proposed and final rules were required to set forth the proposed allocation, plaintiffs refer the court to the Guidelines for Fruit,

Vegetable, & Specialty Crop Marketing Orders issued by the Secretary on January 25, 1982. These guidelines were issued in response to the President's Task Force on Regulatory Relief. The court, however, is provided with no authority that the Guidelines have any force and effect at all in the resolution of the issue before the court nor with evidence of what discussions, if any, took place between the Secretary and the Almond Board. Moreover, the court does not read the Guidelines as requiring the provision of a specific percentage of allocated use.

Plaintiffs further challenge the final rules issued for the crop years on the ground that the record does not indicate, that the Secretary performed any independent analytical or judgmental functions but, rather, relied solely on the statistics supplied to him by the Board.

First of all, it is noted that eight of the nine proposals in connection with the almond butter marketing development program were approved by unanimous vote of the Almond Board. Secondly, as discussed above, case law does not support plaintiffs' strict position.

2. Special Assessments and Minimum Prices.

Whenever a reserve is established, the Board may authorize handlers to act as the Board's agents in disposing of the reserve by entering an agency agreements with the handlers. 7 C.F.R. § 981.67. Agency agreements are submitted to the Agricultural Marketing Service for review. Peggy Leong testified that because the Agricultural Marketing Service will and does call with changes to the proposed agency agreements, the absence of a call from

the Agricultural Marketing Service constitutes approval of the particular agency agreement. During each of the years that the market development/almond butter program was in existence the agency agreements included provisions imposing a special assessment on those reserve almonds sold into almond butter outlets and establishing a minimum price for these almonds.

Plaintiffs contend that the Board lacked the statutory authority to include these provisions in the agency agreements. Plaintiffs further argue that these provisions are invalid because they were not submitted to notice-and-comment rulemaking pursuant to the Administrative Procedures Act.

a. Lack of Authority.

As a threshold matter, the Department takes the position that there is no issue whether the AMAA authorizes the establishment of minimum prices for almonds because of the voluntary nature of the agency agreements. Plaintiffs respond to this contention with the assertion that the contested contractual provisions are subject to the rule-making provisions of the APA, a contention non-responsive to the point being made by the Department.

Plaintiffs, referring the court to 7 U.S.C. §§ 608c(5), (6) and (7), argue that the only provision in the AMAA permitting the establishment of minimum prices pertains to milk. The statutes pertaining to fruits and vegetables do not contain such a provision.

However, plaintiffs are focusing entirely on those provisions of the AMAA setting forth the powers that may be used to regulate the market as a whole in order to produce parity prices. In this regard, it is clear that Congress contemplated that regulation of

agricultural commodities other than milk would not be achieved through the setting of prices. The Almond Board, in drafting the agency agreements which contained the contested provisions, was not seeking to insure parity prices for producers and handlers but, rather, was seeking to ensure that the reserves could be entirely disposed of in future crop years. Thus, the difference in the central mechanisms used to regulate milk and other commodities is not dispositive of the issue whether the Board may establish minimum prices for reserves in order to facilitate future disposition. Furthermore, Section 981.66 of the Almond Marketing Order provides:

> The Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest price obtainable consistent with the ultimate disposition of reserve, subject to all conditions of this section.

Section 981.67 of the Almond Marketing Order further provides that a handler requesting to act as the agent of the Board shall be authorized "upon such reasonable terms and conditions, including inspection and certification requirements as the Board may require . . . ." These regulations constitute a reasonable interpretation of the Board's statutory authority. The establishment of minimum prices for reserves in an agency agreement is a logically necessary adjunct of the Board's power over the reserve.

Plaintiffs' reply that the Department's argument ignores the Notice of Recommended Decision and Opportunity to File Written Exceptions with Respect to Proposed Marketing Agreement and Order published by the Secretary on June 8, 1950 in 15 Fed.Reg. 3623, 3636-37 is not persuasive. The language from

the proposed Almond Marketing Order relied upon by plaintiffs is permissive, not mandatory. Thus, it does not preclude the interpretation forwarded by the Department.

Plaintiffs' further argument that because the "terms and conditions" provision in Section 981.67 specifically refers to inspection and certification requirements, the failure to include therein the ability to set a minimum price for reserve almonds should be construed by the court to preclude such a contractual provision is too attenuated given the broad scope of authority granted to the Board by the Almond Marketing Order to dispose of reserve almonds.

b. Requirement of Rulemaking.

Plaintiffs further argue that the Board could not include the minimum price and special assessment provisions in the agency agreements without first complying with the notice and comment requirements of 5 U.S.C. § 553.

The Department responds that the agency agreements drafted by the Board from 1982-1986 did not constitute "rules" within the meaning of the APA because handlers were not required to enter into them.

Plaintiffs respond by referring the court to *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1054 (D.C. Cir. 1987), wherein the District of Columbia Circuit held that "any contract provisions that are legislative are subject to § 553's notice and comment requirements."

The Department again insists [*sic*] that "the entirely optional nature of the agency agreements robs

them of the defining characteristic of a legislative rule."

The court agrees with the Department. A "rule" is defined in 5 U.S.C. § 551(4) as follows:

> (4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

However, the notice and comment provisions do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice . . . ." As explained in *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984, 987 (9th Cir. 1980):

> The fundamental distinction between legislative rules and interpretative rules has been described by Professor Davis in the following manner:
>
> > 'A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules.'
>
> 2 K.C. Davis, *Administrative Law Treatise*, § 7:8 (2d Ed. 1979).

In *Carter v. Cleland*, 643 F.2d 1, 8 (D.C. Cir. 1980), the Court of Appeals explained:

> A substantive or legislative rule, which must conform to the APA's rulemaking procedures . . . is one that has the force of law and narrowly limits administrative discretion . . . An interpretative rule, on the other hand, is one that merely clarifies or explains an existing rule or statute.

Here, the fact that the handler can choose by executing or not executing the agency agreement negates the premise that these provisions have the force of law.

3. Extension of Deadline - Violation of APA.

7 C.F.R. § 981.66(e), captioned "Disposition after September 1", provides in pertinent part:

> Any reserve almonds remaining unsold as of September 1 shall be disposed of by the Board as soon as practicable through the most readily available reserve outlets. The date of September 1 herein specified may be extended to a later date by the Secretary, upon recommendation by the Board or other information.

On July 30, 1986, a meeting of the Almond Board was held. At that meeting, the Board voted to recommend that the Secretary extend the deadline for disposing of reserve almonds from September 1, 1986 to March 1, 1987. The report of this meeting to the Secretary from the Agricultural Marketing Service states in pertinent part:

> Chairman Walt Payne reported the recommendations and discussion of the Market Development Committee. Based upon the recommenda-

tion of the committee, the [Board] recommended that the Secretary extend the effective date for disposition of reserve almonds from September 1, 1986 to March 1, 1987. This action is authorized under section 981.66(e) and would permit the industry to dispose of about 6.6 million pounds of unsold reserve almonds over a longer period of time and so help prevent the sales from unduly depressing prices in the market. It also enables the industry to supplement the reduced 1986-87 crop supply by carrying over 6.6 million pounds from the large 1985-86 crop. The [Board] motion was made on a nine to one vote, with Cloyd Angle [president of Cal-Almond] voting in opposition. Mr. Angle, and certain others at the meeting indicated that they believed CAGE [now Blue Diamond] had taken advantage of its dominance in the industry and on the [Board] in this action. They contended that when the low crop estimate for the 1986 crop was announced in April that CAGE stopped selling reserve almonds, confident that prices would increase and that CAGE could ensure a recommendation to the Secretary to extend the deadline for the sale of those almonds. CAGE, of course, controls 6 of the 10 [Board] positions, enough for a voting majority. There is probably some validity to both CAGE's and Cloyd Angle's explanations for the recommendation, since CAGE almost certainly realized that an extension was both obtainable and desirable to it as a business, but also it seems clear that an extension would benefit the industry as a whole by stabilizing almond supplies over the 1986-87 season.

On August 25, 1986, the Secretary published in the Federal Register the Final Rule adopting the recommendation of the Board to extend the date, stating in pertinent part as follows:

> This action is based on a recommendation of the Almond Board of California . . . and upon other available information. It is further found that this action will tend to effectuate the declared policy of the act.
>
> . . .
>
> The extension of the date for the disposition of reserve almonds to reserve outlets was recommended in view of the projected short 1986-87 almond crop. Reserve outlets include: Market development, which includes school lunch, almond butter, and complementary promotional projects; and noncompetitive outlets, such as animal feed and almonds used for crushing into oil. In particular this is the fifth year of a market development program for almond butter, in which reserve almonds have been committed to the trade. The extension of the date will allow the industry to meet its market development obligation for almond butter promotion with reserve almonds from the 1985-86 crop, rather than using almonds from the 1986-87 season. Thus, the extension would benefit the industry by stabilizing almond suppliers over the 1986-87 season.
>
> It has been determined that an emergency situation exists which warrants publication of this final rule without prior opportunity for public comment. This action will relax a restriction on handlers by allowing them additional time to sell

> their 1985-86 crop year reserve almonds beyond the current September 1, 1986 deadline. Therefore, this action should take effect on or before September 1, 1986 and consequently, there is not sufficient time to issue a notice of proposed rulemaking soliciting comments from the public.
>
> Therefore, pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice of rulemaking and other public procedure with respect to this emergency action are impracticable and contrary to the public interest, and that good cause is found for making this emergency final action effective less than 30 days after publication of this document in the Federal Register.

Plaintiffs argue that this court should find, as the ALJ did, that the Secretary violated the APA because there was no emergency necessitating the issuance of the final rule without the issuance of a proposed rule and a period of public comment. The Judicial Officer ruled to the contrary.

With respect to the requirement that compliance with the APA is impracticable, it has been held that a deadline set by agency rather than Congress means that the deadline is irrelevant to the question of good cause excusing compliance with the notice and comment rulemaking revisions of the APA. *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983). As explained in *United States Steel Corp. v. United States Environmental Protection*, 595 F.2d 207, 213 (5th Cir. 1979):

> [T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B)

> exception . . . The deadline is a factor to be considered, but the agency must still show the impracticability of affording notice and comment.

However, where time truly has been short through no fault of the agency, courts have found that the agency has carried its burden of showing good cause for not affording notice and comment. *Central Lincoln Peoples' Utility Dist. v. Johnson*, 735 F.2d 1101, 1117 (9th Cir. 1984); *Arizona State Department of Public Welfare v. Department of Health, Education and Welfare*, 449 F.2d 456, 481 (9th Cir. 1971), cert. denied, 405 U.S. 919 (1972); *National Federation of Federal Employees v. Devine*, 671 F.2d 607, 611 (D.D.C. 1982); *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1157 (D.D.C. 1981); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981).

Here, the court concludes that the process of arriving at a decision to follow the Board's recommendation is involved enough that notice and comment is not practicable, especially given that that the September 1 deadline is a pre-existing and permanent part of the Almond Marketing Order.

Irrespective of whether the court finds that there was a sufficient emergency to constitute good cause, plaintiffs further argue the APA absolutely requires that the Secretary have addressed in the final rule at issue the dissenting viewpoints to the extension of the deadline of which the Secretary was aware because of the Agricultural Marketing Service report quoted above.

However, the case upon which plaintiffs rely, *Rodway v. United States Department of Agriculture*, 514 F.2d 809, 816-817 (D.D.C. 1975), does not

so hold. Moreover, the concern in that case was the absence of any administrative record for review by the court.

Finally, plaintiffs argue that the final rule extending the deadline for disposing of the reserve almonds was arbitrary and capricious. Plaintiffs argue that the Secretary never explains how disposing of the 6.6 million pounds of reserve almonds into noncompetitive outlets could have any effect on the 1986 short almond crop year nor the fact that an audit revealed evidence that reserve almonds supposedly being sold for almond butter during the prior years were actually being sold into competitive outlets.[7]

However, the court notes the evidence that because the 1986-87 almond crop was projected to be smaller than usual, extending the deadline for disposing of the 1985-86 reserve would enable the Board to have almonds available for the Reserve Market Development Program without the need for a reserve to be established for the 1986-87 crop year. Therefore, the goals of the Reserve Market Development Program could be satisfied without depriving handlers of the ability to sell their almonds in the 1986-87 crop year.

G. Section 981.31 of the Almond Marketing Order.

7 C.F.R. § 981.31 sets forth the membership representation for the Almond Board of California.

More than 40 years after its issuance following formal notice and comment rulemaking procedures,

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[7] In the court's opinion, the fact and results of the audit showing nononcompliance with the almond butter program is not relevant to whether the Secretary had a rational basis for extending the deadline to dispose of the reserves.

plaintiffs assert that the adoption by the Secretary of this regulation was arbitrary and capricious because it permits a single entity, the cooperative Blue Diamond, to have six seats on the ten member Almond Board if Blue Diamond has over 50% of the tonnage for the preceding year. Blue Diamond has had six seats on the Almond Board in every year from 1950 through 1987 except 1980, 1981 and 1987. Six affirmative votes are required by the Almond Board in order for recommendations to be made to the Secretary. However, with respect to recommendations concerning advertising and promotion, seven affirmatives are required.

The court is not persuaded by plaintiffs' arguments that Section 981.31 is "arbitrary and capricious . . . in light of congress' express determination that marketing orders and marketing order regulations . . . be equitable." In the court's opinion, the record before the court demonstrates that the Secretary was considering equity when it issued the challenged portion of the Marketing Order. The court sees nothing inherently unfair or arbitrary in giving the votes on an annual basis to the groups that handle the most almonds. In fact, over time, the cooperative has not always been so.

Plaintiffs assert that Section 981.31 violates due process of law because it permits "a single entity, and more particularly a competitor, to be able to control what matters are referred to the Secretary for regulation, and which ones are prevented from going to the Secretary for regulation." However, the only case cited by plaintiffs in support of this asserted denial of due process is *Carter v. Carter Coal Company*, *supra*, 298 U.S. at 310-311. However, as held above, the court does not think that there has been an

unconstitutional delegation of authority and, in any event, *Carter v. Carter Coal Company* is of doubtful validity in the present day.

Moreover, as the Department points out, in order to withstand a substantive due process challenge, a "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955). Here, as noted above, there is such a rational relationship.

Moreover, it is simply not true that Section 981.31 prevents minority viewpoints from ever reaching the Secretary for consideration. In the Decision with Respect to a Proposed Marketing Agreement and Order, 15 Fed. Reg. 4272 (1950), the Secretary expressly provided that the views of the independent handlers would be considered by the Secretary in ruling on a recommendation if those views did not concur with those of the cooperative handlers.

H. Administrative Process - Denial of Due Process.

Plaintiffs further argue that the delay in the resolution of this Section 15(A) petition constitutes a denial of due process. In so arguing, plaintiffs request the court to take judicial notice of the Motion to Compel Agency Action Unlawfully Withheld or Unreasonably Delayed and the Declaration of Brian Leighton in support thereof filed in *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, No. CV-F-87-195 EDP.

Plaintiffs filed the administrative petition the subject of this action on March 2, 1987. This petition

was dismissed by the ALJ on September 22, 1987 on the ground that it did not comply with rules of practice requiring specificity in pleadings. On October 26 and 27, 1987, plaintiffs filed an amended petition and an appeal of the dismissal of the initial petition. The ALJ held the amended petition in abeyance pending resolution of the appeal. On February 2, 1988, following the receipt of briefs by the parties, the Judicial Officer ruled that plaintiffs' appeal was moot because they had filed the amended petition. On May 26, 1988, plaintiffs sought interim and declaratory relief from the ALJ with respect to their challenges to the creditable advertising rules. The ALJ denied this request on June 6, 1988. Pursuant to plaintiffs' request, the ALJ certified plaintiffs' appeal of this denial on August 18, 1988. On the same date, the ALJ placed in abeyance the Department's motion for a pre-hearing conference to simplify the issues and advance the proceeding. On October 27, 1988, the Judicial Officer dismissed plaintiffs' appeal of the denial of the request for interim and declaratory relief and denied plaintiffs' attempt to receive a ruling on the Secretary's decision. On November 18, 1988, plaintiffs filed a motion for reconsideration of the Judicial Officer's decision. The Judicial Officer denied reconsideration on January 10, 1988. On January 13, 1989, the Department filed a status report with the ALJ and renewed its motion to advance the proceedings. The parties filed a joint submission of issues to be decided on March 29, 1989. On May 8, 1989, Blue Diamond Growers, Inc. filed a motion to participate in the proceedings, which motion was granted on May 31, 1989. The ALJ conducted a hearing on the merits of plaintiffs' amended petition on June 20-21, 1989 in Sacramento. On July 11, 1989,

plaintiffs moved to preclude Blue Diamond's participation, which motion was granted on August 7, 1989. The parties submitted proposed findings of fact, conclusions of law, and briefs on October 2, 1989 and January 31, 1990. Plaintiffs filed a reply brief on February 28, 1990. On April 5, 1990, the ALJ requesting clarifying information from the parties. Responses by the parties were filed on April 16 and 18, 1990 and plaintiffs filed a reply brief on April 27, 1990. On June 22, 1990, the ALJ issued his Decision and Order, which as noted earlier is 92 pages. On August 16, 1990, plaintiffs appealed the issues adversely decided to them and the Department did so on September 17, 1990. The case was referred to the Judicial Officer on November 6, 1990. The Judicial Officer's Tentative Decision was issued on December 11, 1990 and the final Decision was issued on January 23, 1991.

While there is no question that completion of the administrative process in connection with this Section 15(A) petition was very lengthy, it is also apparent that some of the delay directed resulted from the sheer number and magnitude of the issues raised in the petition as well as from the litigation tactics adopted by plaintiffs. In attempting to prepare for oral argument in connection with the issues raised in connection with this petition alone this court had to continue oral argument twice and had to keep this matter under submission for a several months. While the court does not mean to condone deliberate hinderances [*sic*] or bad faith, the court thinks it unrealistic of plaintiffs to expect prompt resolution of the quality and quantity of issues raised herein.

ACCORDINGLY, IT IS ORDERED that plaintiffs' Motion for Summary Judgment is denied. IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is granted. IT IS FURTHER ORDERED that the decision of the Secretary of the United States Department of Agriculture is affirmed in its entirety as set forth herein.

JUDGMENT FOR DEFENDANT TO BE ENTERED

Dated: June 2, 1992

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-91-123 REC

CAL-ALMOND, INC., GOURMET PACKING COMPANY, INC. AND GOLD HILLS NUT COMPANY, INC., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: June 3, 1992]

ORDER AFFIRMING THE DECISION OF THE SECRETARY OF THE DEPARTMENT OF AGRICULTURE

On November 12, 1991, the court heard the parties' cross-motions for summary judgment. More accurately, these motions constitute an appeal from an administrative decision. Upon due consideration of the written and oral arguments of the parties, the court now enters its order affirming the decision of the Secretary of the Department of Agriculture as set forth herein.

Plaintiffs Cal-Almond, Inc., Gourmet Packing Company, Inc. and Gold Hills Nut Company, Inc. have filed

a First Amended Complaint for Review of Agency Action under 7 U.S.C. § 608c(15)(B), Mandamus, Declaratory Relief and Reimbursement of Assessments. By this First Amended Complaint plaintiffs seek review by this court of the final administrative action of the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement of 1937 (hereinafter referred to as the AMAA), 7 U.S.C. §§ 601 *et seq.*[1]

A. Standard of Review

As noted above, plaintiffs seek review pursuant to 7 U.S.C. 608c(15), which involves petitions by handlers for modification of a Marketing Order or an exemption therefrom. Section 608c(15)(A) of the AMAA provides that the handler must first petition the Secretary and be given an opportunity for a hearing. "After such hearing, the Secretary shall make a ruling upon the prayer of the petition which shall be final, if in accordance with law." §608c(15)(A). Section 608c(15)(B) provides for review by the appropriate district court of the Secretary's ruling. "If the court determines that such ruling is not in accordance with

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[1] On June 4, 1991, the government moved to dismiss certain allegations of plaintiffs' complaint on jurisdictional grounds, and on July 25, 1991, this court granted the government's motion with regard to: (1) plaintiffs' 5th Amendment takings argument and request for damages under the AMAA; and (2) plaintiffs' allegations concerning the 1990-91 crop year. On May 15, 1992, the parties stipulated to the dismissal of specified allegations of the First Amended Complaint pertaining to the takings claim. In addition, the parties stipulated that all allegations in the First Amended Complaint relating to the legitimacy of almond reserves for the 1988-1989 crop year specified in the stipulation are dismissed with respect to Gold Hills Nut Co., Inc.

law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." §608c(15)(B).

The scope of review of the Secretary's administrative decision turns on whether the question at issue is one of law or fact. Questions of law are reviewed *de novo*. 5 U.S.C. 706; *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988). Review of questions of fact requires "substantial inquiry . . . a thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Such review includes a preliminary determination of whether or not the Secretary acted within the scope of his authority. 5 U.S.C. 706(2)(C); *Overton Park*, 401 U.S. at 415. Consideration then turns to whether the act was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). "To make this finding courts must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Overton Park*, 401 U.S. at 416. In certain situations the reviewing court may be called upon to determine whether or not substantial evidence supports the Secretary's findings. 5 U.S.C. 706(2)(E); *Overton Park*, 401 U.S. at 414. Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Last, the reviewing court must inquire as to whether

the Secretary's action followed necessary procedural requirements. 5 U.S.C. 706(2)(D); *Overton Park*, 401 U.S. at 417.

It should be noted that where, as here, the Secretary and the ALJ disagree the standard of review does not change. The ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984).

Finally, it is important to keep in mind that the *desirability* of the challenged Marketing Order or of an obligation imposed thereunder is not a question before the court on review. The only question at issue here is the validity of the actions taken by defendant pursuant to the Marketing Order, the AMAA and/or the APA. *See e.g., Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 319 (3d Cir.) *cert. denied*, 394 U.S. 929 (1969).

B. Was the Final Reserve Rule Invalid as Retroactive?

In the administrative proceeding plaintiffs argued, and the ALJ agreed, that the 25% reserve rule was invalid as retroactive. The JO reversed the ALJ on this issue, and adopted verbatim the reasoning set forth in the government's petition on appeal. Specifically, the JO's adoptive decision stated,

> [the] rule operates prospectively, and was not promulgated in violation of the APA or the [AMAA].
>
> . . . This rule setting forth the *procedure* for the establishment of a reserve operates prospectively only.
>
> . . . .

. . . No handler was legally obligated to withhold from handling a reserve percentage before a reserve percentage rule was promulgated. Therefore, neither the rule establishing the procedure for determining the reserve percentage, nor the actual rule establishing a reserve percentage, is unlawfully retroactive . . .

. . . The [AMAA] gives abundant authority to the Secretary to issue rules that maintain orderly marketing conditions, and states that it is the policy of Congress to allow the Secretary discretion to promulgate regulations to effectuate this purpose. Pursuant to this authority, the Secretary has established a scheme that will control harmful market fluctuations in the California almond industry by the restriction of the handling of almonds at certain times. Therefore, the reserve program is not in violation of the [AMAA].

Additionally, the reserve rules are not in violation of the APA . . . this rule did not alter the *past* legal consequences of past actions, and therefore it was not illegally retroactive.

. . . [T]he fact that a regulation imposes a future liability on past actions does not render it retroactive. The reserve rule does not regulate past activity. Instead, it establishes a prospective reserve requirement using all almonds handled in the crop year in the calculation. In simplest terms, no handler would be retroactively held liable for failure to maintain the 25% reserve during the 1988-89 season before the reserve requirement was made effective . . .

> As established in the rulemaking proceeding establishing the reserve provisions of the Order, it is necessary for this rule to consider all almonds handled during the crop year in order to further congressional policy, and impose restrictions on all handlers equally. Thus, the reserve rule was not unlawfully retroactive. To the extent that it has retroactive tendencies . . . it is clearly authorized by and is not in violation of the [AMAA].

Because the JO's decision rested on a legal conclusion this court reviews the issue de novo.

Plaintiffs contend that the reserve is a classic retroactive rule because it penalizes conduct that was not unlawful at the time the conduct occurred. According to plaintiffs, Congress, in enacting the AMAA, intended for the Secretary to impose reserves for orderly marketing and supply management, but Congress did not intend for the Secretary to promulgate retroactive rules. Citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988), plaintiffs argue that absent a Congressional grant of power to promulgate retroactive rules, the reserve rule is invalid.

In *Bowen* the Supreme Court addressed the issue of retroactive rulemaking in the Medicare context. Holding a rule of the Secretary of Health and Human Services invalid as retroactive, the *Bowen* court determined that although the Medicare Act provides for some form of retroactive action to make corrective adjustments in reimbursements made under the Act, it does not provide the power for retroactive rulemaking. So holding, the court stated,

> [i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is

> limited to the authority delegated by Congress. In determining the validity of the Secretary's retroactive cost-limit rule, the threshold question is whether the Medicare Act authorizes retroactive rulemaking.
>
> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

488 U.S. at 208-209.

Not surprisingly, the government contends that the reserve rule is not impermissibly retroactive, and to the extent that it exhibits retroactive characteristics it is merely secondarily retroactive. A secondarily retroactive rule is defined as a one with exclusively future effect which affects[2] past transactions. *Bowen*, 488 U.S. at 219-20 (Scalia, J., concurring).[3]

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[2] It is important to note the definitions of effect and affect. Webster's Third New International Dictionary defines effect as "something that is produced by an agent or cause . . . a resultant condition" and affect as "to produce a material influence upon or alteration in."

[3] Justice Scalia gives the following example of secondary retroactivity. The Treasury Department might decide that, for purposes of assessing future income tax liability, trust

The government interprets *Bowen* as permitting secondarily retroactive rules where, as here, the rule is reasonable. As the government describes it, the reserve requirement did not suddenly require that handlers have sold no more than 75% of their almond receipts. Instead, it obligated handlers to deliver to the Board, or account to the Board for, a quantity of almonds equal to 25% of the volume which they had handled that year. The rule did not require that the reserve almonds be drawn from those received during the year. Thus, even if a handler had sold all of his crop, no penalty would be imposed unless he failed to fulfill his reserve requirement on the open market.

The court agrees with plaintiffs that the reserve rule is retroactive. As Justice Scalia's trust example makes clear (*supra*, n.8), a rule is retroactive if, for example, it makes completed past conduct, such as receiving trust income without paying taxes thereon, illegal or punishable by, for example, requiring that back taxes be paid on previously received trust income. On the other hand, a rule is secondarily retroactive if it, from "X" point in time, changes the legal consequences of that same conduct, receiving trust income, if completed in the future, while affecting the past conduct, making the trust less desirable tax-wise, but without making it illegal or punishable. And, of course, a rule is not retroactive if it has no impact on past conduct.

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income which was previously nontaxable will be taxable. In such a situation, the tax regulation does not alter the past legal consequences of receiving trust income; back taxes are not imposed. Instead, the regulation creates a different *future effect* of receiving trust income, i.e., tax liability on the receipt of trust income in the future, and *affects the past* desirability of the trust.

Plugging the reserve rule into Justice Scalia's example, it is clear that the rule is fully retroactive. To avoid being penalized, the handler who sold 100% of his almonds must produce a 25% reserve, i.e., pay back taxes. The reserve cannot be said to be merely secondarily retroactive because it affects the legal consequences of past conduct in that such conduct is penalized. The reserve does not just affect the desirability of continuing that conduct in the future.

Having determined that the rule is fully retroactive the court now turns to the issue of whether or not Congress intended for the Secretary to promulgate rules retroactively. As noted, plaintiffs argue that Congress did not have such an intent. However, a careful reading of § 608c(6)(C) of the AMAA causes the court to disagree. Section 608c(6)(C) provides,

> [i]n the case of the agricultural commodities and the products thereof . . . orders issued pursuant to this section shall contain one or more of the following terms . . .
>
> (C) Allotting, or providing methods for allotting, the amount of any such commodity . . . which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, *under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or*

> *product* . . . to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, *during any specified period of periods shall be equitably apportioned among all of the handlers thereof.*

(Emphasis added). Plaintiffs argue that the phrase "in such prior period as the Secretary determines to be representative" means that the Secretary may consider the amount shipped during the year to determine the reserve percentage to impose on the almonds that a handler *has available* for current shipment. According to plaintiffs, this amount cannot include almonds already shipped.

The court disagrees with plaintiffs' interpretation because it is not supported by the plain language of the statute. Section 608c(6)(C) expressly states that a reserve requirement may be based on the amount each handler has available *or* upon the amount previously shipped by each handler *or* both. It is evident that Congress intended that the Secretary be able to impose a reserve which encompasses *all* almonds handled during the crop year in question. Given the continuous manner in which almond handlers receive and ship almonds throughout the crop year, §608c(6)(C) necessarily operates retroactively to some extent. Plaintiffs have argued that *Bowen* requires Congressional intent that a reserve rule may operate retroactively to be evident from the language of the statute. The court agrees. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990) (wherein the Supreme Court,

noting the tension between its statement in *Bowen* that "[r]etroactivity is not favored in the law . . . congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," and the principle set forth in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), that a court must apply newly promulgated laws retroactively to pending cases, simply stated that under either view, "where congressional intent is clear, it governs." 494 U.S. at 853-854.). However, an explicit statement that rules promulgated pursuant to this statute may operate retroactively is not necessary in order to discern Congressional intent. Congressional intent may be evident without being expressly stated. What is important is that the intent be clear, and it is clear here.

The reasoning underlying the intent that the reserve operate retroactively is reflected in the policy of the AMAA. The declared policy of the AMAA is to establish and maintain orderly marketing conditions for agricultural commodities as will provide parity prices to farmers, protect the interests of the consumer by maintaining parity prices, establish and maintain the orderly flow of agricultural commodities and avoid unreasonable fluctuations in supply and price, and continue for the remainder of a marketing season any regulation which tends to avoid the disruption of the orderly marketing of any commodity, provided the regulation was initiated during such marketing season on the basis of need to effectuate the aforestated policy. 7 U.S.C. 602. Section 608c(6)(C) concerns the process for defining the amount of commodity upon which the reserve will be based with the purpose of ensuring that the total

quantity of such commodity to be marketed during any specified period will be equitably apportioned among all handlers. The goal of the AMAA is accomplished by allowing the Secretary to promulgate a uniform rule based on the amount of almonds each handler has currently available and/or the amounts previously handled. If the reserve obligation were imposed only on the amount of almonds currently available for shipment without regard to the amount each had previously received and shipped as plaintiffs argue, handlers would be subject to disparate, inequitable obligations. This practice would frustrate the policy of the AMAA of having the burden of maintaining parity prices apportioned equally among all handlers, and would create artificial and destabilizing market incentives on the part of handlers to receive and process almonds as early in the crop year as possible in order to avoid the reserve requirement, therefore adversely affecting the interests of the consumer in maintaining parity prices and the orderly flow of almonds.

That Congress intended the Secretary to be able to promulgate regulations at any time during the crop year and for those regulations to have an effect upon the entire crop year is further evidenced by the fact that the Secretary has the ability to release almonds held in reserve. As provided in 7 C.F.R. 981.59(a), "[u]pon any increase in the salable percentage and corresponding decrease in the reserve percentage, the reserve obligation of each handler for the entire crop year to the effective date of such action shall be computed in accordance with such revised salable and reserve percentages." In decreasing reserve percentages, the Secretary takes into account all of the almonds previously received and shipped by handlers

in the same retroactive manner that the initial reserve requirement was imposed, "the restoration to the salable quantities of the respective handlers shall be pro rata on the basis of certified kernel weight poundage of reserve contributed by said handlers *during the crop year* to the date of increase of the salable percentage . . ." 7 C.F.R. 981.59(b).

Having determined that the reserve rule is retroactive and that the AMAA allows reserve rules to operate retroactively, plaintiffs' contention that the timing of the rule was unreasonable or unduly burdensome is beside the point. Congress intended that reserve rules operate retroactively to some extent. Consequently, the Secretary's promulgation of the retroactively operating reserve rule is valid as within parameters set by Congress. While the court understands plaintiffs' frustration with this state of affairs, it is the nature of the beast, so to speak, that handlers will not conclusively know their reserve obligation, if any, until sometime after the season has begun. This court has no power to change the fundamental manner in which this system is structured. The almond marketing system was created by Congress and the route to change lies with that same governmental body. Similarly, the route to changing or terminating a marketing order lies with the Secretary, 7 U.S.C. 608c(16)(A), *Cal-Almond, Inc. v. United States Department of Agriculture*, No. 90-16343 at 3096 (9th Cir. March 30, 1992), or by a vote of the almond growers. 7 U.S.C. 608C(16)(B); *Ca-Almond, Inc.*, at 3102.

C. Was the Reserve Rule Arbitrary and Capricious?

In determining whether an act was arbitrary and capricious a reviewing court must make a searching and careful inquiry into the facts, but the ultimate standard of review is a narrow one. The court must attempt to determine the connection between the facts relied upon by the agency and the determination made.

Plaintiffs argue that the final rule issued by the Secretary setting forth the reserve requirements for the 1988-89 crop year was arbitrary and capricious and therefore in violation of the APA. The essence of plaintiffs' argument is that the time gap between the Board's recommendation of the 25% reserve rule in July, 1988, and the Secretary's issuance of the final rule in January, 1989, makes the rule arbitrary and capricious. Included within this argument is the additional contention that the final reserve rule is arbitrary and capricious because, due to the lag between the time the reserve was recommended and the time when the reserve rule issued, the information upon which the Secretary relied in issuing the rule had become stale.

As plaintiffs point out, when the Marketing Order was instituted in 1950 the Secretary noted the desirability of having the crop year begin a sufficient time prior to the beginning of harvests in order to permit the preparation and issuance of appropriate regulations to govern the handling of the coming crop. The Secretary recommended that the crop year begin July 1st. The Secretary also recommended that the Board's recommendation be made no later than August 1st, in recognition of the fact that handlers should know the reserve percentages before active trading begins. 7 C.F.R. 981.49. Observing the importance of the considerations set forth by the Secretary

in 1950, plaintiffs contend that the time lag in issuing the 1988-89 final reserve rule is necessarily arbitrary and capricious, especially since the Secretary did nothing during that time to attempt to maintain parity prices or to avoid unreasonable fluctuations in supplies.

As for the substance of the final reserve rule, plaintiffs argue that the Secretary failed to mention what facts justified the 25% reserve after the season had smoothly progressed for six months without one.

The government responds that it is industry practice to withhold for reserve the amount which the Board recommends to the Secretary, and it is this practice which caused the season's smooth progression during its first six months.[4] The "anomalous delay" in publishing the 1988-89 reserve rule did not undercut the basic assumption underlying the reserve, i.e., that it would be issued in accordance with the Board's recommendation. As the Secretary explained upon imposition of the final rule in January, 1989, the reserve was necessary to *maintain* such orderly marketing conditions,

> If the reserve were zero and all available California almonds were sellable, almond prices, in

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[4] Plaintiffs deny that such an industry practice exists, and argue that since the purpose of the APA is to give the public a chance to comment on proposed rules and convince the Secretary not to issue "bad" rules, handlers were not obligated to anticipate the rule that the Secretary might eventually issue. To this the government responds that, "[n]otwithstanding the concerns the Secretary may have had in 1950, the almond industry today does not suffer from any economic uncertainty in those rare instances where the reserve requirement is not formally promulgated before the most active trading begins."

> a market which already has enough supplies on hand, would be expected to drop in both domestic and foreign markets. Thus, the Board's recommendation for a 25% reserve is designed to effectuate the purposes of the Act by avoiding unreasonable fluctuations in supplies and prices.

The government asserts that the fact that the final reserve rule did not issue until January does not diminish the logical force of the Secretary's rationale, stating,

> [t]he Secretary could not, as plaintiffs suggest, ignore the fact that the orderly marketing conditions which prevailed form the beginning of the crop year to January were only the result of almond handlers withholding surplus almonds in anticipation of a reserve requirement. The relevant industry conditions had not changed from the time that the Almond Board made its reserve recommendation—the supply of almonds still far exceeded the demand, thereby justifying a reserve requirement for that year.

The court finds the delay in issuing the reserve rule unfortunate but not arbitrary and capricious. Plaintiffs have not cited any authority for the proposition that an otherwise valid rule becomes invalid because the issuance of the rule is delayed. Furthermore, whether or not the delayed issuance of the rule was allegedly arbitrary and capricious is solely a minor, collateral matter to the much more important question of whether or not the content of the rule was arbitrary and capricious. In *Motor Veh. Mfrs. Assoc. v. State Farm Mut.*, 463 U.S. 29, 43 (1983), the Supreme Court determined that the scope of review under the arbitrary and capricious standard is basi-

cally limited to an inquiry into the reasons supporting issuance of the challenged rule. The court has read through the Secretary's statement published simultaneously with the reserve rule which addressed comments received and outlined the facts upon which the decision to impose a reserve was based. The Secretary considered, *inter alia*, the economic impact of a reserve, the size of the crop, and the effect of a reserve on an oversupplied market, stating,

> [p]ursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.
>
> . . . .
>
> Total 1988 crop marketable production has been projected to be 556.8 million kernel weight pounds —which would be the third largest crop in history. Total 1988-89 crop year supplies (1988 crop marketable production plus marketable production carried in from the 1987-88 crop year) are projected at a record large 782.4 million kernel weight pounds—11.3 percent larger than last year's previous record supply of 702.9 million kernel weight pounds. These projections are based on the most recent official almond crop estimate. Worldwide supplies for 1988 are also expected to be a record

> high. Domestic and export trade demand for 1988-89 is estimated at 530 million kernel weight pounds.
>
> . . . .
>
> While this rule may restrict the amount of almonds which handlers may sell in normal domestic export markets, the salable and reserve percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns . . . Also, the creation of a reserve from this year's crop may add market stability to the 1989-90 crop year by reserving 25 percent of this year's production for shipment during the 1989-90 season in the event that 1989 production is inadequate to fill that season's trade demand.

The court finds that an obvious and rational connection between the facts found by the Secretary and the choice made with regard thereto exists. This is all that the Supreme Court requires. *Motor Veh. Mfrs. Assoc.*, 463 U.S. at 43. Accordingly, the court finds that the 1988-89 reserve rule was not arbitrary and capricious in any manner.

D. Did the Secretary Fail to Comply with the USDA's Internal Regulations by Labeling the Reserve Rule "Non-Major"?

Department Regulation 1512-1[5] (hereinafter "DR") is an internal agency regulation based on Executive

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[5] DR 1512-1 provides in part,

Order 12,291, 3 C.F.R. 133-134[6], (hereinafter "EO"). DR 1512-1 instructs the USDA to classify proposed actions as "major" or "non-major" in accordance with certain criteria contained in the EO, and which subjects "major" proposed actions to additional procedural requirements.

In the administrative proceeding, plaintiffs challenged the USDA's determination that the reserve rule was not "major" within the meaning of DR 1512-

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1. PURPOSE

This directive is intended only to improve the internal management of the Department and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person.

2. DEFINITIONS

"Major" regulations are those which are likely to result in one or more of the following:

(1) An annual effect upon the economy of 100 million dollars or more; or

(2) A major increase in the costs or prices for consumers; individual industries; Federal, State or local government agencies; or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

[6] Section 9 of the EO provides, "[t]his Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person . . ."

1. The JO determined that the USDA's compliance with the EO or with DR 1512-1 was not judicially reviewable, and that regardless of whether or not the agency closely follows the EO and/or DR 1512-1, the final reserve rule was not arbitrary and capricious because the USDA's assessment of the effects of the reserve rule met the requirement of reasoned, non-arbitrary decisionmaking.

As the court understands plaintiffs' argument, plaintiffs assert that the USDA, having adopted DR 1512-1, was obligated to follow it, *Service v. Dulles*, 354 U.S. 363, 389 (1957), that the reserve rule is "major" as defined within DR 1512-1[7], that it failed to

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[7] According to plaintiffs, the price per pound of almonds between July 1988, and January 1989, was stipulated to be over $1. The 25% reserve caused approximately 140 million pounds of almonds to be withheld from the market. Thus, argue plaintiffs, the reserve rule was "major" as it had an effect on the market of over $140 million. Because the rule was "major," the USDA was obligated to follow the procedures for issuing major rules as set forth in DR 1512-1. These procedures instruct the agency to do the following: (1) review a regulatory impact analysis; (2) prepare a memorandum of law showing that the major regulation is within the authority of the agency; (3) draft alternative regulations; (4) review and clear major regulatory actions and impact analyses to assure consistency with program policy, etc.; (5) submit to evaluative review in connection with information and recordkeeping requirements.

The government disputes that the rule should have been classified as "major." The Secretary, addressed the argument set forth by plaintiffs, i.e., that the reserve would have an effect upon the economy of $100 million or more, when he issued the final rule. According to the Secretary, such an argument equates the value of the reserve,

> to lost revenue. In actual practice, the reserve does not equal lost revenue, because such a calculation does not take into account expected improved returns from the 75

follow DR 1512-1 in issuing the reserve rule because the agency failed to classify it as "major," and that this failure constituted arbitrary and capricious conduct which renders the reserve rules invalid.

It is the government's position that a private right of action to enforce the agency's compliance with its internal regulations does not exist. The government argues that the plain language of DR 1512-1 (i.e., "this directive . . . is not intended to create *any* right or benefit, substantive or procedural, enforceable at law by a party against the United States [or] its agencies . . .") contradicts plaintiffs' inter-

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percent salable portion of the crop, or the returns received from the 25 percent of the crop which will be sold to low-value outlets or released to the salable category later in the season. In the event that some or all of the reserve is transferred to the salable category later in the season, there would not be a reduction of revenue received for the reserve, but improved returns would be anticipated for both the reserve and the initial salable percentage of 75 percent of the 1988-89 almond crop. Therefore, this action will not have an impact of $100,000,000 on the annual economy but is designed to prevent a negative impact on the almond industry due to oversupplied markets.

Plaintiffs respond that,

> [i]f preventing the sale of 139,000,000 pounds, admittedly worth well over $100,000,000.00, will improve grower returns to the point where the grower gets more net revenue off of selling 75% of his crop than he would selling 100% of his crop, necessarily, *consumers* are expending more than an additional $100,000,000.00 for those almonds than they would otherwise have to spend without a reserve, and actually more than the value of the 139,000,000 ponds of reserve almonds (worth in excess of $150,000,000.00), and that certainly has an affect (*sic*) on the economy of in excess of $100,000,000.00.

pretation, and that the DR does not provide a vehicle by which plaintiffs may challenge the reserve rule as arbitrary and capricious.

Plaintiffs contend that DR 1512-1's provision that it does not create any right or benefit enforceable by any party simply means that persons affected by the regulation cannot go to court *prior to the issuance of the final rule* and claim that the department is not following its own regulations. Upon issuance of a rule, however, the agency's action can be challenged for non-compliance with the DR. Accordingly, plaintiffs assert that they are not claiming damage awards or a private right of action due to the USDA's failure to follow DR 1512-1. Instead, they are asserting that the Secretary's failure to comply with the agency's internal regulations is evidence that the final reserve rule was arbitrary and capricious. *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356 (D.C. Cir. 1979) (an "agency's failure to follow its own regulation is fatal to the deviant action").

The court agrees with the government that the USDA's compliance or non-compliance with DR 1512-1 and/or EO 12,291 is not judicially reviewable. *State of Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986), supports this conclusion. In *Thomas* the Sixth Circuit determined that the plain language of EO 12,291 evinced the "clear and unequivocal intent that agency compliance with Executive Order No. 12,291 not be subject to judicial review." Consequently, DR 1512-1, which contains the same language as EO 12,291, is not a hook upon which plaintiffs can hang their challenge to the reasonableness of the final reserve rule. Therefore, whether or not the reserve rule was arbitrary and capricious cannot be deter-

mined by looking to the USDA's compliance or non-compliance with DR 1512-1 in enacting it.

Of course, as plaintiffs argue, there are cases which state, *inter alia*, that an agency's failure to follow its internal regulations in promulgating a rule is "fatal to the deviant action." *Way of Life Television Network, supra*, 593 F.2d 1356. *See, Service v. Dulles*, 354 U.S. 363, 389 (1957); and *Simmons v. Block*, 782 F.2d 1545, 1549-50 (11th Cir. 1986). However, as the government points out, these cases are easily distinguished in that the internal regulations involved therein did not interpret an agency directive which explicitly provided for non-reviewability. *Thomas*, on the other hand, specifically interpreted EO 12,291 and found an unequivocal intent that agency compliance not be subject to judicial review. Accordingly, the court finds that the USDA's compliance with DR 1512-1 is not judicially reviewable and, consequently, that plaintiffs' challenge to the final reserve rule on this basis must fail. The determination of the JO as to this matter is affirmed.

E. Did the Reserve Rule Contain a Substantial Basis and Purpose?

Plaintiffs argue that the Secretary's imposition of the final reserve rule lacked a substantial basis and purpose, and list three general alleged defects with the Secretary's decision. First, plaintiffs contend that the Secretary failed to show a rational connection between the facts found and the choice made, that, in fact, the Secretary merely rubber-stamped the Board's recommendation, and that the imposition of the final reserve therefore constituted arbitrary and capricious conduct.

Second, because the Secretary allegedly failed to make the connection between the facts and his decision, plaintiffs contend that his decision was not based on an independent economic analysis of trade demand. Plaintiffs admit that the APA does not require the Secretary to conduct an economic study before imposing a final rule, but argue that if the reason for the reserve was based on economic conditions and considerations, the Secretary should have performed an economic study.

Last, plaintiffs assert that the Secretary failed to address comments submitted in opposition to the opposed rule, including those anticipating that almond demand would be higher than that contemplated by the reserve rule.

The court understands plaintiffs' position, but, having read the statement delivered by the Secretary at the time the final reserve rules issued, agrees with the government that the Secretary's decision to impose the reserve was supported by a statement of substantial basis and purpose. *National Soft Drink Assoc. v. Block*, 721 F.2d 1348, 1354 (D.C. Cir. 1983) ("We do not weigh the evidence; we merely examine the record to see if there is evidence, which if accepted by the Secretary, supports the determination of the agency.") As the government points out, the statement of basis and purpose "need not be an exhaustive, detailed account of every aspect of the rulemaking proceedings; it is not meant to be the more elaborate document, complete with findings of fact and conclusions of law, that is required in an on-the-record rulemaking." *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 852 (D.C. Cir.), *cert. denied. sub nom. Atlantic Richfield Co. v.*

Independent U.S. Tanker Owners Committee, 484 U.S. 819 (1987).[8]

When the Secretary issued his final rule approving a 25% reserve, he explained the basis for the imposition of the reserve stating,

> [t]otal 1988 crop marketable production has been projected to be 556.8 million kernel weight pounds —which would be the third largest crop in history. Total 1988-89 crop supplies . . . are projected at a record large 782.4 million kernel weight pounds— 11.3 percent larger than last year's . . . Worldwide supplies for 1988 are also expected to be a record high. Domestic and export trade demand for 1988-89 is estimated at 550 million kernel weight pounds . . . [T]he salable and reserve percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. The reserve percentage is designed to reduce the oversupply situation in the industry in the 1988-89 crop year by holding off the market a percentage of the available almonds that could be added to an already fully supplied market.

Thus, the Secretary made a connection between the facts and his decision. Plaintiffs' contention that the

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[8] Contrastingly, with reference to a statutory requirement which specifically obligates an agency to include in its statement of basis and purpose the methodology used in obtaining and analyzing data, the D.C. Circuit recently stated that such procedural requirements were "more stringent than those previously applicable under the Administrative Procedure Act." *Union Oil Co. v. EPA*, 821 F.2d 678, 682 (1987).

Secretary merely rubber-stamped the Board's recommendation is not factually supported. In any event, the AMAA contemplates a close working relationship between the Secretary and the Board. *Block v. Community Nutrition Institute*, 467 U.S. 340, 346 (1984).

The Secretary also addressed comments presented in opposition to the reserve, stating,

> several commenters state that the price improvement gained by the reserve would have to be quite high in order to compensate for the holding of a reserve, because these commenters equate the reserve to losing 25% of their crop. In actual practice, the 25 percent reserve is not lost to the market. Commonly, a portion of the reserve, and in some cases, the entire reserve, is released to be freely salable later in the season, as the 18 percent reserve portion of the crop was released in the 1987-88 crop year. Such releases may occur once a portion of an annual corp has been marketed, and the danger of a seriously oversupplied market early in the marketing season, with consequent price reductions, has passed.
>
> . . . .
>
> Raising a similar concern, another commenter stated that in the event that the 25 percent reserve is not released later in the season or carried over into the next year, the Board should prepare an economic analysis to be certain that the improvement in grower and handler returns due to the holding of the 25 percent reserve would be sufficient to cover the reduction in revenue represented by selling the reserve into non-

> competitive outlets such as almond butter, oil, donations to educational or charitable organizations, etc. The Department anticipates that the Board will review economic conditions as the season progresses and will make recommendations to release reserve almonds as they are needed.

Finally, such a study is not required by the APA. Moreover, the Secretary most definitely did take into consideration projections of the 1988-89 crop yield and market demand, both domestic and foreign, in reaching his decision that the imposition of a reserve rule was economically desirable. Furthermore, as quoted directly above, the Secretary stated that he anticipated that the Board would review economic conditions as the season progressed and make recommendation to release reserve almonds as needed.

Accordingly, the court finds that the Secretary's decision was supported by a statement of substantial basis and purpose and that such statement is sufficient to withstand plaintiffs' challenge. The determination of the JO as to this matter is affirmed.

F. Was the Assessment Rule Invalid as Retroactive?

Plaintiffs argue that the Secretary's budget and advertising assessment is invalidly retroactive as it applies to almonds received prior to the issuance of the final assessment rule. The court's decision regarding this issue can be found in its Order Affirming the Decision of the Secretary of Agriculture filed in No. CV-F-91-064-REC.

G. Do Either the AMAA or the Marketing Order Permit Assessments on Almonds Held in Reserve?

Plaintiffs contend that neither the AMAA nor the Marketing Order permit the imposition of assessments on almonds held in reserve. The court's decision regarding this issue can be found in its Order Affirming the Decision by the Secretary of Agriculture in No. CV-F-91-064-REC.

H. Do Either the AMAA or the Marketing Order Require that Reserves be Held in California?

The Almond Board has informed handlers that they may not store their reserve almonds outside of the state of California.

7 C.F.R. 981.38 grants the Board the following powers:

> (a) To administer the provisions of this part in accordance with its terms;
>
> (b) To make rules and regulations to effectuate the terms and provisions of this part;
>
> (c) *To receive, investigate and report to the Secretary complaints of violations of this part; and*
>
> (d) To recommend to the Secretary amendments to this part.

(Emphasis added).

To aid the Board in exercising its powers under §981.38, §981.70 provides,

> Each handler shall keep records which will clearly show the details of his receipts of almonds, with-

> holdings, sales, shipments, inventories, reserve disposition, advertising and promotion activities, and other pertinent information in respect to his operations pursuant to the provisions of this part . . . *Each handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of the aforesaid records and for inspection and observation of almonds. The Board shall make such checks of almonds or audits of each handler's records as it deems appropriate or are requested by the Secretary to insure that accurate information as required in this part is being furnished by handlers.*

(Emphasis added).

In his decision, the JO determined that the foregoing sections grant the Almond Board the authority "to impose ancillary requirements which reasonably control the geographic scope of its oversight activities," and held that the Board acted reasonably and within the boundaries of its authority in requiring that reserve almonds be stored within California.

Plaintiffs make three arguments in connection with this prohibition. First, they contend that neither the AMAA nor the Marketing Order preclude a handler from storing his almonds outside of California. Since plaintiffs export the majority of their almonds, they would like to be able to store reserve almonds in areas near their final destination, i.e., Germany, so that upon release they can make quick shipment to the buyer. Plaintiffs assert that

storing almonds in Germany would not be a hardship[9] or "neuter" the government's investigatory powers because "there are USDA officials all around the country, including in foreign countries.[10]"

Second, plaintiffs challenge the prohibition on vagueness and due process grounds. They acknowledge that an agency's interpretive rules are entitled to deference, but argue that this prohibition is a substantive rule, not an interpretive rule. Plaintiffs argue that this "substantive" rule derived from the AMAA is both unconstitutionally vague and its enforcement constitutes a denial of due process because it does not give fair warning of the proscribed conduct.

Third, plaintiffs contend that this "substantive" rule was not imposed in compliance with the APA, is ultra vires, and therefore void.

The court is in complete agreement with the government's assertion that the storage restriction is an *interpretation* of the part of the Marketing Order which requires handlers to ensure that their premises are accessible to authorized representatives of the Board for observation and examination. As such, the restriction is not subject to the procedural requirements for the APA. 5 U.S.C. 553(b)(A) and (d)(2).[11]

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[9] Plaintiffs offered to reimburse USDA officials for travel expenses.

[10] For example, plaintiffs point to the fact that USDA officials previously travelled to Europe to verify the fact that almonds meant to be made into almond butter were indeed being used for that purpose.

[11] 5 U.S.C. 553(b)(A) and (d)(2) provide,

Accordingly, the court finds that the restriction on the location of almond reserves is interpretive. The ability to restrict the place of storage for reserve almonds is a necessary adjunct to the Board's inspection, enforcement and administrative activities. The court further finds that the restriction is supported by, *inter alia*, those sections of the Marketing Order which grant the Board power to investigate violations of reserve obligations. Plaintiffs' challenge to that restriction therefore fails; the JO's determination as to this matter is affirmed.

I. Do Either the AMAA or the Marketing Order Prohibit Future Sales Contracts in Connection with Almonds Held in Reserve?

The USDA has stated its position that a contract for the disposition of reserve almonds entered into before the release of the reserve constitutes a sale or consignment and is therefore an act of handling within the meaning of the Marketing Order. As

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(b) General notice of proposed rule making shall be published in the Federal Register . . .

. . . .

Except when notice or hearing is required by statute, this subsection does not apply-

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . .

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except-

(2) interpretative rules and statements of policy . . .

noted, 7 C.F.R. 981.50 prohibits the handling of reserve almonds. The USDA determined that such future sales contracts are price-depressing and detrimental to the reserve program.

In his decision, the JO made the following observations and determinations.

> Deference to agency expertise is especially appropriate when the regulations in question are components of intricate, highly technical regulatory programs, such as marketing orders. Agency interpretations of regulations implementing this type of program are to be upheld on review if they are reasonable. The AMS position on contracts for the future sale of reserve almonds meets this standard.
>
> The formation of a contract for the future sale of almonds is reasonably viewed as placing those almonds into the channels of trade. The term "sale" can reasonably be read as including future sale. Moreover, commitments for future sales of storable agricultural commodities, such as almonds, are known to have substantial intertemporal effects on prices. The existence of these economic effects strongly supports the conclusion that contracts for future sales place reserve almonds into the channels of trade.
>
> Agency action is "presumed to be based on facts justifying the specific exercise of . . . delegated authority." Petitioners have not presented any evidence sufficient to overcome this presumption favoring the Agency's position on contracts for futures sales of reserve almonds. Therefore, the Department's position should stand.

Plaintiffs set forth several arguments why the restriction on future sales contracts is invalid. As in their above argument, plaintiffs assert that this restriction is a substantive rule which was not passed in accordance with the APA. Plaintiffs also argue that the restriction would inhibit the ability of handlers and buyers to enter into contracts for the entire crop year because handlers will be unable to predict early in the season the size of a reserve, if any. Plaintiffs further assert that future sales contracts are not price-depressing. What would be price-depressing is prohibiting handlers from entering into future sales contracts and, upon release of the reserve, causing all handlers to scramble about in attempt to move their almonds at the same time. Last, plaintiffs contend that a handler does not put almonds into the channels of trade merely by entering into a future sales contract.

In response the government characterizes plaintiffs' argument as basically twofold: the restriction is invalid because the Secretary failed to follow APA promulgation procedures, and because it is unreasonable. First, the government argues that the Secretary's determination that future sales contracts for reserve almonds violates the AMAA's prohibition on the placement of such almonds into channels of commerce is interpretive and therefore deserving of substantial deference. Plaintiffs do not overcome this presumption of validity by suggesting that future sales contracts are not undesirable because year-long contracts are commonly entered into between handlers and buyers. As the government states, such a suggestion misses the point,

> [a]s plaintiffs are well aware, a contract entered into prior to the beginning of the crop year wherein a buyer agrees to buy all or a percentage of what the handlers will have available for shipment during the coming crop year does not implicate the *reserve* almonds. The future sales contracts prohibited by the Board deal specifically with the almonds that are being held in reserve. The Department interprets these contracts as acts of "handling" because there is a reasonable expectation that such future sales contracts might satisfy some of the demand that is only supposed to be satisfied by the salable percentage of almonds available for sale into competitive outlets. If futures sales contracts based on reserve almonds were allowed to satisfy some portion of the demand (including the demand for future supplies of almonds) which exists prior to the lifting of the reserve, then the effectiveness of the reserve as a device to maintain parity prices by restricting supply would be diminished.

Second, in connection with plaintiffs' contention that upon lifting the reserve, the sudden scramble of handlers to sell the released almonds would depress prices, the government responds that there is no evidence of this supposed effect. To the contrary, because the Secretary approves a lifting of the reserve requirement only when there is evidence that demand requires that additional almonds be placed on the market, prices upon release will not be depressed.

As with the storage requirements discussed *supra*, the court finds the restriction against entering into future sales contracts interpretive and supported by, *inter alia*, those sections of the Marketing Order

which prohibit the handling of reserve almonds. 7 C.F.R. 981.50. Accordingly, plaintiffs' challenge to this restriction fails and the JO's determination as to this matter is affirmed.

J. Does the Administrative Process to Which Plaintiffs were Subject Constitute a Violation of Due Process?

Plaintiffs argue that the lengthy administrative process to which they were subject without the availability of interim relief constitutes a denial of due process. The court's decision regarding this issue can be found in its Order Affirming the Decision of the Secretary of Agriculture filed in No. CV-F-91-064-REC.

ACCORDINGLY, IT IS ORDERED that plaintiffs' Motion for Summary Judgment is denied. IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is granted. IT IS FURTHER ORDERED that the decision of the Secretary of the United States Department of Agriculture is affirmed in its entirety as set forth hereinabove.

JUDGMENT FOR DEFENDANT TO BE ENTERED

Dated: June 2, 1992

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District
Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-91-122 REC

CAL-ALMOND, INC., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT

[FILED: JUNE 3, 1992]

ORDER AFFIRMING THE DECISION OF THE SECRETARY OF AGRICULTURE

On November 12, 1991 the court heard the cross-motions for summary judgment filed by the parties herein. More accurately, these motions constitute a review of an administrative decision.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court issues its rulings for the reasons set forth herein.

Plaintiff Cal-Almond, Inc. has filed a Complaint for Review of Agency Action under 7 U.S.C. § 608c(15)(B), Mandamus, Declaratory Relief and Reimburse-

ment of Assessments. By this complaint plaintiffs seek review by this court of the final administrative action of the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (hereinafter referred to as the AMAA), 7 U.S.C. §§ 601 *et seq.*

A. Standard of Review.

7 U.S.C. § 608c(15) involves petitions by handlers for modification of a marketing order or an exemption therefrom. Section 608c(15)(A) provides that the handler must first petition the Secretary of Agriculture and be given an opportunity for a hearing. "After such hearing, the Secretary shall make a ruling upon the prayer of the petition which shall be final, if in accordance with law." Section 608c(15)(B) provides for review by the appropriate district court of the Secretary's ruling. "If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion the law requires."

As explained in *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315-316 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969):

> The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a *de novo* fact finding process. It is limited to a determination of whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence. If they are, they may not be disturbed.

> Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Where an administrative agency disagrees with the conclusions of its ALJ, the standard does not change. The ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983). The weight accorded the ALJ's findings is greatest where credibility based on witness demeanor is at issue. However, with respect to derivative inferences, the reviewing court's deference is to the agency and not to the ALJ. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984); *NLRB V. Brooks Camera, Inc.*, 691 F.2d 912,915 (9th Cir. 1982). However, "[w]here . . . the agency determinations turn on purely legal questions concerning the requirements of the applicable statutes '[t]he questions . . . are questions of law, which we review *de novo*.' . . . . *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988), quoting *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987).

B. Creditable Advertising Assessments.

1. Regulatory Conflict with Statute.

Plaintiffs argue that the creditable advertising regulations contained in 7 C.F.R. § 981.444, captioned "Crediting for marketing promotion including paid advertising," promulgated pursuant to 7 U.S.C. § 608c(6)(I), directly conflict with the prohibition on the regulation of advertising set forth in 7 U.S.C. § 608c(10). Therefore, because an agency action must be set aside if it is in excess of statutory jurisdiction, or limitations, or short of statutory right, *Baltimore Gas and Electric Company v. Natural Resource Defense Counsel*, 462 U.S. 87, 105 (1983), plaintiffs argue that the assessments must be set aside. Plaintiffs contend that Congress, when it enacted Section 608c(6)(I), was "merely telling the Secretary that the marketing order can contain advertising and promotional concepts, handlers can be assessed to fund that program, but if handlers desire to engage in their own advertising and promotion to sell almonds, they can receive credit for that - but without restrictions, prohibitions or regulations concerning how, in what medium, at where the advertisements are placed, or to what market the advertisements and promotions are directed."

There are two relevant statutory provisions involving advertising in the AMAA.

Section 608c(6)(I), enacted in 1970 as part of P.L. No. 91-522, 84 Stat. 1357, provides in pertinent part:

> [Marketing] orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:
>
> . . .
>
> (I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, that with respect to orders applicable to almonds . . . , such projects may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order. . . .

However, Section 608c(10), enacted in 1935 as part of P.L. No. 320, 49 Stat. 750, 758, provides in pertinent part that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereof, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement."

The ALJ agreed with plaintiffs that the regulation conflicted with the statute. The ALJ, however, was reversed by the Judicial Officer.

In the court's opinion, the Judicial Officer is correct. The creditable advertising regulations do not regulate the handler's advertising but only the handler's ability to receive credit for the advertising against the assessment. In other words, the handler is otherwise free to advertise in any manner they choose.

Plaintiffs' premise that handlers are entitled to receive credit for all of their advertising expenditures is not supported by the AMAA. The AMAA itself provides undisputed authority that handlers may be assessed without providing an opportunity for a credit. Moreover, the Almond Marketing Order did not provide for an advertising credit from 1950 to 1970. Finally when Congress provided that advertising expenditures could be credited against annual expenditures, there was no guarantee that every handler would be able to reduce his assessment by the full amount of the allowable credit.

Furthermore, the Department's interpretation of Congressional intent as expressed in the creditable advertising regulations is reasonable given that Congress was aware of the prohibition in Section 608c(10) against regulating advertising when Congress amended the AMAA to enact Section 608c(6)(I) to permit creditable advertising. As the Department contends, if the statutory prohibition on the regulation of advertising is construed to mean that no guidelines or conditions may be established for the receipt of advertising credit, Congress' intent in establishing the creditable advertising program for almonds that such credits be available only for advertisements likely to benefit the industry would be frustrated. A court must presume that Congress acts

with deliberation, rather than by inadvertence, when it drafts a statute. *United States v. Motamedi*, 767 F. 1403, 1406 (9th Cir. 1985). Where two statutes are "'"capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

2. First Amendment.

The ALJ and the Judicial Officer identically ruled that the creditable advertising regulations do no violate plaintiffs' First Amendment rights. The court concurs with these opinions.

The court concludes that the creditable advertising assessments do not implicate First Amendment rights because plaintiffs are not "compelled" to advertise. Section 608c(6)(I) authorizes marketing orders to provide for "production research [and] marketing research and development projects," including "projects . . . provid[ing] for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . ." The Almond Marketing Order contains regulations, duly promulgated through formal on-the-record rulemaking, which authorize the Almond Board to establish market development projects including paid advertising, 7 C.F.R. § 981.14, to credit a portion of a handler's direct expenditures for market promotion, including paid advertising, for the sale of almonds, and to prescribe appropriate rules and regulations as are necessary to effectively regulate the crediting of the

pro rata expense assessment of handlers, 7 C.F.R. § 981.41(c). The regulations do not permit plaintiffs to receive a credit against their annual assessment unless their advertising complies with the regulations regarding creditable advertising, but do not compel plaintiffs to participate in the advertising because plaintiffs are otherwise free to engage in any advertising they wish without interference with the Almond Board. As the Department argues, however, the Board is not obligated to subsidize any and all advertising that plaintiffs choose to engage in.

C. Unlawful Delegation of Judicial or Legislative Authority.

Plaintiffs argue that 7 C.F.R. § 981.441, as applied, constitutes a denial of due process and an unlawful delegation of authority because it permits the Almond Board, made up of plaintiffs' competitors, to decide what constitutes creditable advertising under the terms of the Marketing Order.

The non-delegation doctrine has its roots in the separation of powers principle underlying our tripartite system of government. "[T]he integrity and maintenance of the system of government ordained by the Constitution" preclude Congress from delegating its legislative power to either the Executive or Judicial Branches. *Field v. Clark*, 143 U.S. 649, 692 (1892). In *Mistretta v. United States*, 468 U.S. 361, 371-373 (1989), the Supreme Court reiterated:

> We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate

> Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach of such cooperative ventures: 'In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination.' . . . So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'
> . . . .
>
> Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under general directives . . . Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'

As noted in *National Federation of Federal Employees v. United States*, 905 F.2d 400, 404 (D.C. Cir. 1990), the "intelligible principle" test has not been a tough one. The Supreme Court has not invalidated legislation on non-delegation grounds in over fifty years. Moreover, "[o]nly the most extravagant delegations of authority, those providing no standards to

constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." *Humphrey v. Baker*, 848 F.2d 211, 217 (D.D. Cir.), *cert. denied*, 488 U.S. 966 (1988).

Plaintiffs refer the court to *Carter v. Carter Coal Company*, 298 U.S. 238, 311 (1938). In *Carter*, the Supreme Court addressed the constitutionality of a provision of the Bituminous Coal Conservation Act of 1935. However, as noted in *Wileman Bros. v. Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990), the bar of delegation of "law-making" to competitors expressed in *Carter* has not been applied in modern cases. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *United States v. Frame*, 885 F.2d 1119, 1128-1129 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

The Almond Marketing Order's advertising regulations do not constitute an unconstitutional delegation under *Carter* or other standards articulated by the Supreme Court. The Almond Board staff makes the initial determination as to whether a proposed advertisement is creditable in accordance with regulations set forth in 7 C.F.R. § 981.441. These regulations were adopted pursuant to formal rule-making procedures. A determination that a particular advertisement is not creditable under the regulations may be appealed to the Public Relations and Advertising Committee of the Almond Board, then to the Almond Board, and finally, to the Secretary.

Plaintiffs attempt to argue around this sequence of events by arguing that an advertisement that is approved for credit is not reviewed by the Secretary.

However, this is a distinction without relevance to the issue before the court. If an advertisement has been approved for credit, it was so approved because it complied with the regulation, a regulation that was promulgated by the Secretary through the formal rulemaking process.

Plaintiffs further argue that the fact of the administrative appeal remedy is beside the point because the appeal may take many years. In so arguing, plaintiffs refer the court to *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965). *Freedman* has nothing to do with the unconstitutional delegation issue raised by plaintiffs. *Freedman* holds that a noncriminal process requiring prior submission of a film to a censor avoids violation of the First Amendment freedom of expression only with procedural safeguards designed to eliminate the dangers of censorship.

Therefore, the court concludes that the creditable advertising regulations do not constitute an unlawful delegation of authority as argued by plaintiffs. There is sufficient oversight available under the law to withstand this constitutional challenge.

ACCORDINGLY, IT IS ORDERED that plaintiff's Motion for Summary Judgment is denied. IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is granted. IT IS FURTHER ORDERED that the decision of the United States Secretary of Agriculture is affirmed in its entirety as set forth herein.

JUDGMENT FOR DEFENDANT TO BE ENTERED.

Dated: June 2 , 1992

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

CASE NO. CV-F-91-685 REC

CAL-ALMOND, INC., A CALIFORNIA CORPORATION; AND GOLD HILLS NUT COMPANY, INC., A CALIFORNIA CORPORATION, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

COURT ORDER GRANTING DEFENDANT'S SUMMARY JUDGMENT AND DENYING PLAINTIFFS SUMMARY JUDGMENT

Based upon the Complaint on file herein, the administrative record, the previous Decisions issued by this Court on June 3, 1992 in cases numbers CV-F-91-064, 91-122 and 91-123 REC, and based upon the stipulation of the parties hereto,

IT IS HEREBY ORDERED that summary judgment shall be entered for the Defendant, and summary

judgment should be denied for the Plaintiffs, with a Judgment for the Defendant to be entered.

Dated: July 9, 1992.

/s/ ROBERT E. COYLE
ROBERT E. COYLE, Judge
United States District Court,
Eastern District of California

APPENDIX I

UNITED STATES DEPARTMENT OF AGRICULTURE

No. AMA Docket No. F&V 981-4

IN RE: SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., A CALIFORNIA CORPORATION; CAL-ALMOND, INC., A CALIFORNIA CORPORATION; CARLSON FARMS, A SOLE PROPRIETORSHIP

[Decision and Order filed January 23, 1991]

By: DONALD A. CAMPBELL, Judicial Officer

[Syllabus Omitted in Printing]

Preliminary Statement

This is a proceeding instituted by a petition filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Order Regulating the Handling of Almonds Grown in California (7 C.F.R. Part 981).[1]

On June 20, 1990, Administrative Law Judge Edwin S. Bernstein (ALJ) filed an initial Decision and Order ruling on numerous issues raised by petitioners. He

[1] See generally Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, §§ 2.01-.15, 2.46-.58 (1981 and 1989 Cum. Supp.).

held that most of petitioners' contentions were invalid, but that the Agricultural Marketing Agreement Act of 1937, the Administrative Procedure Act and/or the Marketing Order were violated as to six issues.

On August 16, 1990, petitioners appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] Petitioners appealed all but one of the issues decided adversely to the petitioners. On September 17, 1990, respondent appealed as to the six issues decided adversely to the Department. On November 6, 1990, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, I find no merit in petitioners' contentions and, therefore, I am dismissing the petition. I am adopting those portions of the ALJ's initial decision set forth below, with a few trivial changes, and with additions included within brackets, and omissions indicated by dots. Additional conclusions by the Judicial Officer follow the ALJ's initial decision. For a proper understanding of the findings, it is helpful to first read the following provisions of the Act, Order and regulations.

---

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Provisions of the Statute

The following provisions of the Agricultural Marketing Agreement Act of 1937, as amended, set forth the statutory scheme relevant here (7 U.S.C. §§ 602(1)-(3), 608c(1)-(4), (6)(A), (6)(C), (6)(D), (6)(E), (6)(I), (7)(A), (7)(C), (7)(D), (9), (10), (12), (14), (15), (16), 608d(1), 610(b) (emphasis added)):

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter,

to establish and maintain such production research, *marketing research, and development projects* provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title, such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title [which includes almonds], other than milk and its products, in interstate commerce *as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.*

. . . .

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cran-

berries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, *fruits* (including filberts, *almonds*, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C. 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin).

. . .

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section [which includes almonds], he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other

findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

. . . .

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including almonds] *orders* issued pursuant to this section *shall contain one or more of the following terms and conditions, and* (except as provided in subsection (7) of this section), *no others*:

(A) *Limiting*, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or *quality* thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

. . . .

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current

shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) *Determining*, or providing methods for determining, *the existence and extent of the surplus of any such commodity* or product, or of any grade, size, or quality thereof, *and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.*

(E) *Establishing* or providing for the establishment of *reserve pools of any such commodity* or product, or of any grade, size, or quality thereof, *and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.*

. . . .

(I) *Establishing or providing for the establishment of* production research, *marketing research and development projects designed to* assist, improve, or *promote the marketing, distribution, and consumption* or efficient production *of any such commodity or product*, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That *with respect to orders applicable to almonds, . . . such projects may provide for any form of marketing promotion*

including paid advertising and with respect to *almonds*, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit *may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising* as may be authorized by the order. . . .

. . . .

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

. . . .

(C) *Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:*

(I) *To administer such order in accordance with its terms and provisions;*

(ii) *To make rules and regulations to effectuate the terms and provisions of such order;*

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

. . . .

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

. . . .

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the pro-

ducers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. *No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any*

provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

. . . .

(12) Approval of cooperative association as approval of producers

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

. . . .

(14) Violation of order; penalty

Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between

the date upon which the defendant's petition was filed with the Secretary and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) *Any handler* subject to an order *may file a written petition* with the Secretary of Agriculture, *stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.* He shall thereupon be given an opportunity for a hearing *upon such petition*, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling *upon the prayer of such petition* which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted

pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have,

during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

. . . .

§ 608d. Books and records; disclosure of information; notification of Congressional committees

(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such

report, where it has been requested and has not been furnished, the Secretary is authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

. . . .

§ 610. Administration

. . . .

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. *The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.*

(2)(i) . . . .

(ii) *Each order* relating to any other commodity [i.e., other than milk] or product issued by the Secretary under this chapter *shall provide that each handler* subject thereto *shall pay to any authority or agency* established under such order *such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. . . .* The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) *Any authority or agency established under an order may maintain* in its own name, or in the name of its members, *a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses.* The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

Relevant Provisions of the Almond Order and Regulations

The following are pertinent provisions (7 C.F.R. §§ 981.10, .22, .30, .31, . 38, .40, .41, .45-52, .59, .65, .66(a), (c), (e)-(g), .67, .80, .81, .441) (1989):

(Note: The provisions of the Order and Regulations are not being reproduced in Agriculture Decisions to avoid retyping.)

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Introduction

Petitioners instituted this proceeding pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 ("AMAA") (7 U.S.C. § 608c(15)(A) (1988)), by filing a Petition on March 2, 1987, which alleged that various aspects of the Marketing Order regulating the handling of Almonds Grown in California ("Order") (7 C.F.R. Part 981) are invalid and not in accordance with law.

The Secretary of the United States Department of Agriculture ("Department") brought an enforcement action against Saulsbury Orchards and Almond Processing, Inc., ("Saulsbury"), in the District Court for the Eastern District of California on February 13, 1986, pursuant to section 8a(6) of the AMAA (7 U.S.C. § 608a(6) (1988)) to compel Saulsbury to pay its assessments. On December 18, 1986, Judge Edward Dean Price granted the government's motion for summary judgment and ordered Saulsbury to comply with the terms of the Order.

On March 2, 1987, Petitioners filed along with their Petition, an Application for Interim Relief. On September 22, 1987, Administrative Law Judge Edward H. McGrail granted Respondent's motion [to dismiss the

Petition] and the Petition and Application for Interim Relief were dismissed.[3] Petitioners next filed an Amended Petition on October 16, 1987. Petitioners also filed an appeal from the decision dismissing the Petition of March 2, 1987, on October 22, 1987. On October 26, 1987, Judge McGrail ordered that the Amended Petition be held in abeyance pending a ruling by the Department's Judicial Officer, Donald A. Campbell, on the Appeal.

By Decision and Order dated February 2, 1988, the Judicial Officer advised that the Appeal was moot as Petitioners had filed an Amended Petition. The case was remanded to Judge McGrail for consideration of Petitioners' Amended Petition.

On May 26, 1988, Petitioners filed a Motion for an Order Holding Creditable Brand Advertising Assessment in an Interest-Bearing Account; or for an Order that Said Assessments will be Returned to the Petitioners if they Prevail in this Administrative Proceeding; and/or Petitioners' Application for Partial Interim Relief; and/or Petitioners' Application for a Ruling that the Secretary has Already Determined that Creditable Advertising Assessments are Constitutional and no Further Exhaustion of Administrative Remedies is Required Regarding the Legality of Creditable Advertising Assessments.

This case was reassigned to the undersigned on June 17, 1988. I certified a question to the Judicial Officer asking for guidance and a ruling on Petitioners' Motion. The Judicial Officer by ruling dated

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[3] [The Application for Interim Relief was denied by the Judicial Officer on April 1, 1987. A second Application for Interim Relief was denied by the Judicial Officer on October 9, 1990.]

October 27, 1988, found that no ruling should be made as Petitioners were seeking declaratory relief in advance of any determination as to their position on the merits.

The parties filed a Joint Submission of Issues to be Decided on March 29, 1989.

On May 8, 1989, Blue Diamond Growers, Inc. ("Blue Diamond"), filed a motion to participate in this proceeding. The motion to participate was granted on May 31, 1989, to the extent permitted by Rule of Practice 900.57 (7 C.F.R. § 900.57 (1989)).

A hearing was held on June 20-21, 1989, in Sacramento, California.

On July 11, 1989, Petitioners filed a Motion to Now Preclude Blue Diamond's Intervention in the Proceedings. By Decision and Order dated August 7, 1989, the motion was granted based upon Blue Diamond's refusal to comply with a subpoena and directions of this Administrative Law Judge in connection with the subpoena.

The parties submitted proposed findings of fact, conclusions of law, and briefs on October 2, 1989, and January 31, 1990. Petitioners filed a Reply Brief on February 28, 1990.

By Post-Hearing Order dated April 5, 1990, I requested clarifying information from the parties. Responses by the parties were filed on April 16 and 18, 1990. Petitioners filed a Reply to Respondent's Responses on April 27, 1990.

All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence. In this opinion, "Tr." refers to the transcript of the hearing. "PX" refers to the

numbered exhibits offered by Petitioners. "RX" refers to the numbered exhibits offered by Respondent. "PPHF" refers to Petitioners' Post-Hearing Findings. "RPHF" refers to Respondent's Post-Hearing Findings. "St." refers to the Stipulated Findings of the parties.

Findings of Fact

1. Petitioners, Saulsbury Orchards and Almond Processing, Inc., Cal-Almond, Inc., and Carlson Farms, are handlers as that term is defined in 7 C.F.R. § 981.13 (1989). (St. ¶¶ 3, 5, 6)

2. Cal-Almond, Inc., is an independent almond handler which was formed by Cloyd Angle in approximately 1976. (Tr. 153-54)

3. Cal-Almond, Inc., handled approximately one million pounds of almonds in 1980; approximately one million pounds in 1981; approximately 3.3 million pounds in 1982; approximately 3.3 million pounds in 1983; approximately 6.7 million pounds in 1984; approximately 6.1 million pounds in 1985; approximately 7.6 million pounds in 1986; approximately 11.6 million pounds in 1987; and approximately 10.5 million pounds in 1988. (St. ¶¶ 5, 9; RPHF)

4. In 1980, [the creditable portion of] Cal-Almond, Inc.'s . . . assessment was $26,115.00; in 1981, it was $23,895.45; in 1982, it was $83,873.88; in 1983, it was $81,859.53; in 1984, it was $167,231.05; in 1985, it was $154,938.50; in 1986, it was $190,146.07; in 1987, it was $291.333.55; and in 1988, it was approximately $265,000.00. (St. ¶ 9)

5. Saulsbury is an independent handler formed in 1978. Robert M. Saulsbury is the President of Saulsbury. (Tr. 64-66)

6. Saulsbury has invested approximately $10 million into the land, the building, and the equipment of its plant in order to become a processor today. (Tr. 69)

7. In 1980, Saulsbury handled approximately 3.8 million pounds of almonds; in 1981, it handled approximately 6.6 million pounds of almonds; in 1982, it handled approximately 10 million pounds of almonds; in 1983, it handled approximately 6.8 million pounds of almonds; in 1984, it handled approximately 17.1 million pounds of almonds; in 1985, it handled approximately 9 million pounds of almonds; in 1986, it handled approximately 1.7 million pounds of almonds; and in 1987, it handled approximately 5.8 million pounds of almonds. (St. ¶ 3)

8. [The creditable portion of] Saulsbury's . . . assessment for 1980 was $97,049.85; in 1981, it was $166,568.33; in 1982, it was $248,276.65; in 1983, it was $169,798.43; in 1984, it was $428,702.02; in 1985, it was $226,338.50; in 1986, it was approximately $40,000.00; in 1987, it was approximately $145,000.00. (St. ¶¶ 3, 8; RPHF)

9. Carlson Farms handled approximately 34,249 pounds of almonds in 1985, approximately 907,000 pounds in 1986, and approximately 202,448 pounds in 1987. (St. ¶ 6)

10. In 1985, [the creditable portion of] Carlson Farms'. . . assessment was $907.59; in 1986, [it] was $22,692.00. (St. ¶ 10)

11. The Secretary promulgated the Order in 1950, pursuant to the authority contained in the AMAA. 7 U.S.C. §§ 601 *et. seq.* (1988); 7 C.F.R. §§ 981.1-.474 (1989); 15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).

12. Section 981.31 of the Order provides for ten Almond Board of California ("Board") members to be

comprised of the following: Two handlers from the cooperative, two from the independent handlers, two growers who market their almonds through the cooperative, and two growers who market their almonds through the independent handlers. There is also to be one additional handler and one additional grower associated with the entity which handled in excess of fifty percent of the California almond crop for the preceding crop year. Thus, whichever entity, the cooperative or the independent handlers and growers, handled in excess of fifty percent of the crop for the previous year will receive six seats on the Board, while the other entity will receive four. 7 C.F.R. § 981.31 (1989).

13. In each year from 1950, when the Almond Marketing Order began, through 1980, Blue Diamond, [formerly known as California Almond Growers Exchange (CAGE),] Petitioners' major competitor, has had six seats on the ten-member Board, and from 1980 to the present Blue Diamond has had six seats on the Board in every year but three, 1980, 1981, and 1987. (Tr. 216- 17; St. ¶ 12)

14. [A majority vote is] required by the Board for recommendations to the Secretary, with the exception of recommendations for advertising and promotion which require seven affirmative votes. 7 C.F.R. §§ 981.40(b), (c) [,(e)] (1989).

15. The cooperative members of the Board have always voted in unison, while the members representing the independent handlers and growers have not always voted in unison. (Tr. 215-16, 219)

16. In the Recommended Decision and Decision approving the Order, the Secretary noted that there were two entities in the California almond industry, the cooperative and the independent handlers and

growers, whose views of industry problems differed. The Secretary acknowledged that the cooperative handled sixty-four percent of the previous crop and as a result would immediately have six seats on the Board. The Secretary stated that a majority vote would be required by the Board to make recommendations, in accord with usual business practice. The Secretary speculated that the cooperative would tend to vote as a unit, and that the independent handlers and growers would tend to vote as a unit. As a result, the Secretary explained that if the independent handlers and growers did not agree with the cooperative's views, their views would be considered carefully by the Secretary before he reached a final decision. 15 Fed. Reg. 4272; 15 Fed. Reg. 3623, 3628, 3630 (1950).

17. The AMAA authorizes the Secretary to include order provisions, with regard to commodities other than milk, limiting the quantity which may be marketed, determining and disposing of any surplus, and establishing a reserve. 7 U.S.C. §§ 608c(6)(A), (D), (E) (1988).

18. The almond crop year runs from July 1 to June 30. 7 C.F.R. § 981.19 (1989).

19. Beginning with the 1982-83 crop year, the Board proposed a five-year Almond Butter Market Development Reserve Program ("Program") to develop new markets for almonds, specifically an almond butter market. (RX 3-23) The purpose of the Program was to develop a market which would reduce future surpluses, provide additional outlets for almonds, and as a result increase grower returns. (RX 4, 6) In addition, the Board planned to promote the use of almonds in school lunch programs. (RX 4)

20. The Order was created to stabilize the almond industry. There were high levels of production that were predicted to continue. There was evidence that indicated if current production levels continued, there would be a significant decrease in price. The Order's purpose was to provide an "adjustment of the supply of almonds to the domestic trade demand," and as a result increase grower returns. 15 Fed. Reg. 3623, 3624 (1950). With these same needs in mind, the Board recommended the Program to the Secretary to create new outlets for almonds. (RX 4, 6)

21. For the 1982-83 crop year, the Secretary imposed a two percent reserve obligation upon the handlers (RX 3, 4); for the 1983-84 crop year, a three percent reserve (PX 16; RX 22); for the 1984-85 crop year, a twenty-five percent reserve . . . (RX 35, 36: St. ¶ 15); and for the 1985-86 crop year, a twenty percent reserve. (RX 66, 67; St. ¶ 16)

22. For the crop years 1984-85 and 1985-86, the Secretary issued revised reserve rules during the crop years [, lowering the reserve obligations]. (PX 19, 20, 21, 23, 24)

23. The Order provides that, when the Secretary declares a reserve, handlers must turn their reserve almonds over to the Board for disposition, or they may sell their reserve almonds acting as agents of the Board. 7 C.F.R. §§ 981.66, .67 (1989). (Tr. 326-29)

24. Section 981.66(c) of the Order specifies the outlets that handlers [or the Board] can use to dispose of their reserve almonds. 7 C.F.R. § 981.66(c) (1989).

25. When a handler acts as an agent for the Board in order to dispose of his reserve almonds, he must sign an agency agreement with the Board governing the terms and conditions for the disposition of reserve almonds. 7 C.F.R. § 981.67 (1989). (Tr. 327, 431-32)

26. If a handler signs an agency agreement and disposes of the reserve almonds, he retains the proceeds. If a handler turns his reserve almonds over to the Board, the Board sells the almonds and gives the proceeds to the handler, less any expenses incurred by the Board. If more than one handler turns reserve almonds over to the Board, the Board pays each handler his pro rata share of the proceeds. 7 C.F.R. §§ 981.66, .67 (1989).

27. The Board sends the agency agreements to the Secretary for approval. (Tr. 432)

28. If the Secretary has any changes or questions pertaining to the agency agreements, he or a representative from the Agricultural Marketing Service ("AMS") will call or write [the Board staff]. (Tr. 442-43, 467-69)

29. The agency agreement contains minimum [required sales] prices [with regard to certain reserve outlets] and special assessments that apply to the handlers' disposition of their reserve almonds. (Tr. 331; PPHF; RPHF) These minimum [sales] prices and special assessments were not promulgated through rulemaking. (Tr. 329)

30. Reserve almonds were [required] to be diverted into "almond oil, almond butter, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds [, unless they were sold to "governmental agencies or charitable institutions for charitable purposes. . . ."] 7 C.F.R. § 981.66(c) (1989).

31. Regarding the special assessments for reserve almonds, there was a 10¢ per pound charge on all almonds sold into almond butter or the school lunch program and that 10¢ was added on to the minimum price, which the handler had to collect from the buyer.

The actual manufacturer of the butter could then receive a rebate of 10¢ per pound provided the manufacturer advertised pursuant to the Board's almond butter advertising rules. (Tr. 335-39; PPHF)

32. If a purported manufacturer of almond butter filed a verification with the Board that it was in fact making almond butter, and that manufacturer purchased quantities of almonds from handlers governed by the Order, and if that almond manufacturer was not in fact making almond butter, but was competing in normal outlets, the handler who shipped the product to that particular purported manufacturer would not have received credit for the disposition. (Tr. 450-51)

33. The Board's audits of some of the manufacturers disclosed that almonds were being sold to at least one firm representing that they were making almond butter, but in fact were not, and the Board never proceeded against the handler who sold the product to the manufacturer, or against the purported manufacturer. (Tr. 160-62, 450-51; PPHF)

34. When the Program began, Saulsbury and Cal-Almond, Inc., attempted to find an outlet for almond butter, along with many other packers, but encountered difficulty in trying to find someone willing to purchase the almonds at the minimum price. (Tr. 89-92, 160-65)

35. During the four-year Program, Saulsbury and Cal-Almond, Inc., continued to attempt to find people who would take their almonds for almond butter. (Tr. 87-88, 162-63)

36. Saulsbury was only able to export a small amount of almonds for almond butter because there were so few willing to pay the minimum price. (Tr. 87-89)

37. During the four-year Program, Saulsbury [sold] the majority of its reserve almonds [for] cattle feed at two to four cents per pound, when at the time the value of the almonds [in non-restricted outlets] was approximately $1.00-$1.10 per pound. (Tr. 89-92)

38. For the first three years of the Program, Cal-Almond, Inc., sold almost all of its reserve almonds to the feedlots because it could not find any legitimate market in almond butter. The feedlots paid approximately five cents per pound. (Tr. 162-63, 168-70)

39. The Program cost Saulsbury and its growers $2-$2.5 million, of which Saulsbury lost between $600,000.00 and $700,000.00 in profit. (Tr. 103-04) [4]

40. Cal-Almond, Inc., lost a considerable amount of money during the Program.[5] Because it could not find an outlet for almonds at the minimum price, it had to sell almonds to the feedlot for approximately five cents a pound, and in 1984 alone it had to dump approximately 300,000 pounds of almonds into cattle feed. (Tr. 168-70).

41. The Order provides that the time to dispose of any reserve almonds may be extended beyond September 1 [of the following crop year] upon recommendation by the Board or other information. 7 C.F.R. § 981.66(e) (1989).

42. The 1986 crop year resulted in an extremely short crop. Handlers were required to dispose of their 1985 reserve almonds by September 1, 1986. Before the spring of 1986 the market for almonds was

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[4] [This does not, of course, take into consideration the price levels for almonds that would have prevailed in the absence of the marketing order program.]

[5] [See note 4, *supra*.]

approximately $1.10-$1.20 per pound, but Blue Diamond knew in the spring of 1986 that the price for almonds would escalate dramatically because of the 1986 short-crop year, and as a result Blue Diamond bloc-voted at the July 1986, Board meeting to extend the deadline for disposition of the reserve almonds from September 1, 1986, to March 1, 1987. (PX 39, 62, 63; RX 75; Tr. 105-07, 111-12, 170-76) [The vote on recommending an extension was 9 to 1 (PX 62, pp. 5-6).]

43. The Secretary extended the date for the disposition of the 1985-86 reserve from September 1, 1986, until March 1, 1987. The Secretary found that the extension would benefit the industry as a whole by, in part, permitting the reserve from the 1985-86 crop year to be used in the next year. The next year was to have been the fifth year of the fiveyear plan and by issuing the extension, the Secretary was able to avoid issuing a reserve for the 1986-87 crop year. (PX 25)

44. The Secretary did not allow notice and comment on the rule issued on or about August 20, 1986, extending the date for disposing of reserve almonds from September 1, 1986, to March 1, 1987. (PX 25)

45. Petitioners, and many other independent almond handlers, had already made commitments to ship their almond reserves pursuant to the previous rules set by the Board, which mandated a disposition by September 1, 1986. Of the 6.6 million pounds of almonds remaining uncommitted for the reserve program on July 30, 1986, Blue Diamond had 4.7 million pounds. (PX 63; Tr. 105-07, 111-12, 170-76, 332-33)

46. Each crop year the Board is required to recommend a budget to the Secretary encompassing the Board's expenses. 7 C.F.R. § 981.80 (1989).

47. The . . . assessment rate [charged handlers on their receipts of almonds] is determined by dividing the pounds of almonds in the crop estimate into the Board's projected expenses. 7 C.F.R. § 981.81 (1989).

48. Since 1980, the Secretary has set a 2.5¢ per pound creditable advertising assessment [rate] for each crop year [, i.e., the amount that the handler can be credited with for his direct expenditures for marketing promotion including paid advertising. The assessment rate each year was slightly higher, usually about 2.8¢ per pound.] (RX 94, 96, 103, 106, 110, 115, 119, 125, 126, 132, 133, 136, 137)

49. The assessment regulation is normally enacted with a retroactive effective date. (Respondent's Brief, p. 77)

50. The Secretary did not allow notice and comment on the annual rules from 1980-86, establishing the [assessment rate and the] creditable [advertising] assessment rate. (RX 94, 96, 103, 106, 110, 115, 119)

51. A handler must pay the . . . assessment directly to the Board, or he may advertise pursuant to section 981.441 of the Order and receive credit [up to the amount of the creditable advertising assessment rate] toward his . . . assessment amount. 7 C.F.R. §§ 981.41, .441 (1989). (Tr. 237)

52. Section 981.441 of the Order establishes the standard for crediting for marketing promotion, including paid advertising. If a handler advertises and wants to receive credit toward his assessment, he must submit a claim form to the Board. On the claim form, the handler must demonstrate that payment was made for the advertisement, and the cost was

consistent with the "standard rate" for the particular advertising medium. 7 C.F.R. § 981.441 (1989). (Tr. 237-38)

53. The Board is not concerned with the cost of the advertisement provided that the expense is within the standard rate card, the standard media expense. (Tr. 239)

54. Under the rules, the handlers have a certain amount of time in which to [engage in marketing promotion including paid advertising, and file documentation with the Board, in order to receive credit for his marketing promotion expenditures.] 7 C.F.R. § 981.441 (1989). (Tr. 234-35)

55. The Board staff makes the initial decision as to whether an advertisement is creditable. (Tr. 299, 309-10) If the advertisement is approved, the handler receives credit and the process ends. If the advertisement is not deemed creditable, the handler may appeal to the Public Relations and Advertising Committee. (Tr. 299, 309) If the Committee denies credit, the handler may appeal to the Board. (Tr. 302) If the Board denies credit, the handler may appeal to the Secretary. (Tr. 310)

56. The Board staff checks an advertisement's content to determine whether it should be deemed creditable. (Tr. 240, 305)

57. There are currently six members on the Public Relations and Advertising Committee, three of whom are associated with Blue Diamond. The staff of the Board has denied credit in the past to an advertisement placed by Blue Diamond. When a vote was taken by the Public Relations and Advertising Committee as to whether or not the advertisement should receive credit, Blue Diamond was permitted to vote on

whether its own advertisement should receive credit. (Tr. 298-302)

58. The Board staff has rejected numerous advertisements for credit, which have been submitted by handlers. (PX 103, 106, 132, 138; Tr. 311-12)

59. The Board has developed an advertising manual, with advertising guidelines, to help clarify to handlers the requirements of section 981.441, and to assist handlers to advertise within the guidelines. (PX 71; Tr. 316-17)

60. It appears that the majority of all almonds sold by handlers are sold to companies for ingredient manufacturing. (Tr. 346)

61. Pursuant to section 981.441, one allowable form of advertising for credit is an advertisement of almonds in conjunction with a complementary product. However, neither the rules nor the Board has a definition of what is a "complementary product," and Peggy Leong's best definition of this is something that does not "disparage almonds." However, Ms. Leong [(the Board manager)] did not believe one could receive credit for an advertisement of almonds alongside a battleship. (Tr. 463-64)

62. A handler cannot receive credit for taking out an advertisement directing consumers to a particular store unless the handler owns that retail outlet. (Tr. 465)

63. Most of the advertisements submitted by handlers for credit have been advertisements placed in the domestic market, but since 1980, 55% to 65% of all almonds were exported. (Tr. 345-46)

64. Almost all advertising done by handlers is domestic advertising, but the domestic sales have not increased to the same ratio that the foreign sales have increased. Thus, advertising by handlers like

Cal-Almond has not been very productive [, according to Cal-Almond's owner]. (Tr. 18183) [However, Dr. John Baritelle, Agricultural Economist, University of California at Riverside, conducted a study of the returns from almond advertising under the California Almond Order in the domestic market, showing that the returns to the industry from almond advertising substantially exceeded the expenditures. (RX 69, Minutes of the Almond Board of California Marketing Policy Meeting, July 25, 1985, at 920).]

65. From 1980 to 1983, Saulsbury attempted to sell almonds on the grocery store shelves but found it impossible to enter that market because it was dominated by Blue Diamond, Planters, Fisher Nuts, and Azar Nuts. (Tr. 69-71)

66. Fishers, Planters and Azar Nuts are rebaggers, and are not regulated by the Almond Marketing Order, but Saulsbury's chief competition in the supermarket business is Blue Diamond. (Tr. 72; RPHF)

67. Blue Diamond sells 92% of the almonds sold in grocery stores and sells 95 out of every 100 cases of snack almonds. (PX 65, 68; Tr. 73-74)

68. Between 1984 and 1987, Saulsbury exported approximately sixty percent of its almonds to ingredient users, and the forty percent that it shipped domestically went to ingredient users for candy, ice cream, cereal and for mixed nuts. (Tr. 75-76; RPHF)

69. From 1980 to 1984, Saulsbury attempted to advertise within the guidelines of section 981.441, but since it could not compete on the store shelf with Blue Diamond, it was genuinely restricted [insofar as it was seeking to receive credit for its advertisements] because of the advertising rules, and thus advertised for a mail order business. (Tr. 77-78)

70. For every dollar Saulsbury spent in advertising within the Board's rules and regulations, it returned less than fifty cents. For example, in 1982, Saulsbury spent approximately $248,276.65 in creditable advertising assessments and its gross mail order sales were between $30,000.00 and $40,000.00, and it cost twice as much to operate the mail order business than was actually received. (Tr. 78-80)

71. Saulsbury experimented with various publications and employed a full time person to investigate how to best receive a return on its advertising dollar, and within the framework of the advertising rules. Saulsbury could not find any permissible forms of advertising that would return an investment on its dollar since most of its sales were to cereal companies and it could not receive credit for advertising those cereals. (Tr. 80-82)

72. On one occasion, Saulsbury found a chain of mini-markets in the Boise, Idaho, area to carry its almonds. Saulsbury took out an advertisement directing consumers to that particular store, and was denied credit for the advertisement [because under the regulations, advertisements "which direct consumers to one or more named retail outlets, other than handler operated, shall not be eligible for credit" (7 C.F.R. § 981.441(c)(5)(iii)).] Saulsbury has no stores of its own. (PX 72; Tr. 82-83)

73. Saulsbury purchased charitable packages of almonds from the Board to give away to charity for credit toward its advertising assessments, but those did not increase Saulsbury's other sales. (Tr. 84-85)

74. Only four to five percent of all almonds produced in California are sold on grocery store shelves as almonds, as opposed to ingredient items. (Tr. 120)

75. Since 1980, Cal-Almond, Inc., could not find any form of advertising permitted under the rules that assisted Cal-Almond in the sale of its almonds. Cal-Almond exports approximately 90% of its almonds as ingredient items, and its domestic sales are for ice cream. (Tr. 176-78)

76. Cal-Almond does not sell almonds on grocery store shelves because it has been unable to compete with Blue Diamond in that market. (Tr. 178)

77. Cal-Almond spends its 2.5¢ per pound advertising on its mail order business, and advertises in some of the best magazines in the United States. (Tr. 178-79)

78. Cal-Almond loses a substantial amount of money on its mail order business. Cal-Almond's gross mail order sales in 1983 were $3,962.19, but it spent $81,085.53 in mail order advertising. In 1984, [the creditable portion of] Cal-Almond's . . . assessment was $167,231.05, and its gross mail order sales were $40,486.33. In 1985, [the creditable portion of] Cal-Almond's assessment was $154,938.50 and its gross mail order sales were $58,357.00. In 1986, [the creditable portion of] Cal-Almond's assessment was $190,146.07, but its gross mail order sales were $76,210.25. In 1987, [the creditable portion of] Cal-Almond's assessment was $291,333.55 but its gross mail order sales were $85,062.11. In 1988, [the creditable portion of] Cal-Almond's . . . assessment was [approximately] $265,000.00, but its gross mail order sales were only $121,075.45. All of Cal-Almond's [advertising money was] spent on mail order advertising. (Tr. 395-99)

79. As a result of the failure of Cal-Almond's advertising program, it hired a new advertising firm to find additional ways to advertise. Cal-Almond

drafted an advertisement for the *Wall Street Journal*, to increase its sales. The advertisement would cost slightly more than $20,000.00. Cal-Almond, Inc., submitted the proposed advertisement to the Board for approval and was denied credit for the advertisement by the Board. (Tr. 399-401; PX 138)

80. Cal-Almond submitted another type of advertisement to the Board for incurred costs for the advertisement. However, the Board denied credit to Cal-Almond for its advertisement. (Tr. 402-04; PX 103)

81. Although Cal-Almond has its company name on its almond boxes, unlike Blue Diamond, Cal-Almond does not have a brand name [that is used on grocery shelves]. (Tr. 406-07)

82. The Board's promotion and advertising activities have been ideologically neutral. (Tr. 431)

83. Whenever the Secretary establishes a reserve, handlers must put into reserve the set percentage of almonds received for their own account during the crop year. 7 C.F.R. § 981.50 (1989).

84. Pursuant to section 981.81(a) of the Order, handlers must pay assessments on almonds received for their own account. 9 C.F.R. § 981.81(a) (1989).

85. Section 981.10 of the Order defines almonds held for the account of the handler to include all almonds received by the handler, including all almonds of his own production. 7 C.F.R. § 981.10 (1989).

86. The Secretary retains the authority to disapprove Board actions at any time. 7 C.F.R. § 981.40(d) (1989).

CONCLUSIONS OF LAW

1. Section 981.31 of the Order is in accordance with law. It is not arbitrary and capricious for the cooper-

ative to hold six seats on the Board, while the independent handlers hold four. The AMAA was designed to benefit cooperatives, and it is not a violation for the cooperative members to bloc vote. *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 202-05 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-89 EDP (E.D. Cal. June 14, 1989), *appeal docketed*, No. 90-15505 (9th Cir. Apr. 24, 1990), No. 90-15781 (9th Cir. June 11, 1990); 7 C.F.R. § 981.31 (1989).

2. Section 981.31 of the Order does not violate section 8c(6) of the AMAA, as this section is inapplicable to the composition of the Board. Further, section 981.31 of the Order is equitable. *Sequoia Orange*, 47 Agric. Dec. 2; 7 U.S.C. § 608c(6) (1988); 15 Fed. Reg. 4272, 15 Fed. Reg. 3623 (1950).

3. Section 981.31 of the Order is not an unlawful delegation of authority by the Secretary. *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989), *cert. denied*, ___ U.S. ___, [110] S. Ct. 1168 (1990); *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); *Sequoia Orange*, 47 Agric. Dec. at 180-85. The Secretary has retained all of the enforcement and implementation authority under the Order. The Secretary has the final approval of all Board actions. 7 C.F.R. § 981.40(d) (1989).

4. Section 981.31 of the Order does not violate Petitioners' right to due process and equal protection under the law. There is a rational basis for the composition of the Board. *City of Dallas v. Stanglin*, 490 U.S. [19], 109 S. Ct. 1591, 1594 (1989); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); 15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).

5. Section 981.31 of the Order does not violate section 8c(7)(A) of the AMAA. The language in section 8c(7)(A) is permissive and thus, section 8c(7)(A) is not a required element for all marketing orders. 7 U.S.C. § 608c(7)(A) (1988).

6. Petitioners fail to meet their burden of proof, and thus section 8d(1) of the AMAA is not rendered moot by section 981.31 of the Order. 7 U.S.C. § 608d(1) (1988).

7. There was a rational basis in the rulemaking record for the establishment of the Program. (1982-83 crop year: PX 34, 36; RX 3, 4, 5, 6, 7, 15. 1983-84 crop year: PX 16, 41, 42; RX 18, 22, 24, 28. 1984-85 crop year: PX 46, 47, 48; RX 31, 35, 36, 37, 39, 40, 55; revisions: PX 19, 20, 21; RX 41, 44, 45, 46, 48, 49, 50, 52, 53, 59, 60. 1985-86 crop year: RX 56, 66, 67, 68, 69, 79, 80, 90; revisions: PX 23, 24, 61; RX 71, 72, 73, 77, 78)

8. . . .

9. There was no unlawful delegation of authority by the Secretary to the Board as to the Program. The Board only recommended the amount of the reserve to be allocated to the Program. The Secretary approved . . . the salable and reserve percentages. (Tr. 459-61)

10. . . . .

11. The process whereby the Secretary, by way of AMS, would call or write if there were any questions or changes, and the absence of a call or letter constituted approval, was proper under the Order. 7 C.F.R. § 981.40(d) (1989). (Tr. 442, 467-69)

12. . . . .

13. It was not a violation of the AMAA for individual handlers who sold almonds for almond butter, almond oil and/or cattle feed during the Program to keep their proceeds, as opposed to having the proceeds

distributed pro rata among all of the handlers. 7 U.S.C. §§ 608c(6)(C)-(E) (1988); 7 C.F.R. § 981.67 (1989).

14. Sections 981.41 and 981.441 of the Order are in accordance with sections 8c(6)(I) and 10(b)(2)(ii) of the AMAA. There is no requirement in the AMAA that the Board must engage in advertising, as opposed to [other] promotional work, before the handlers can be assessed. 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii) (1988); 7 C.F.R. §§ 981.41, .441 (1989).

15. . . . .

16. Section 981.441 was properly promulgated through informal rulemaking, and was not required to be promulgated through formal rulemaking. The AMAA only requires formal rulemaking for the promulgation of the marketing order. Section 981.41 was promulgated through formal rulemaking. Section 981.441 is a regulation implementing section 981.41, and thus only requires informal rulemaking. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc.*, 435 U.S. 519, 524 (1978); 7 U.S.C. § 608c(3) (1988).

17. Section 981.441 of the Order is not an unlawful delegation of authority by the Secretary to the Board. The Board makes the initial determination as to whether a handler's advertisement should receive credit. The Secretary retains the ultimate authority to make the final decision as to what advertisements will be acceptable for credit toward a handler's assessment. 7 C.F.R. §§ 981.40(d), .41(c), .441(c)(6)(v) (1989).

18. The annual rules from 1980-86, establishing the creditable assessment rate, were supported by substantial evidence in the rulemaking record. (PX 40, 41, 61, 62, 63, 77-80, 82, 95, 98, 99; RX 44, 69, 74, 87,

94-100, 103, 105-112, 114-117, 119, 120, 122-126, 131-133, 138, 139)

19. ....

20. ....

21. The assessments of almonds held in reserve pursuant to section 981.81 of the Order are in accordance with law. Section 981.81 provides that a handler must pay an assessment on almonds received by him for his own account. Section 981.10 defines almonds held for the account of the handler to include all almonds received by him, including all almonds of his own production. 7 C.F.R. §§ 981.10, .81 (1989).

22. Section 981.81 of the Order does not violate section 10(b)(2)(ii) of the AMAA. Section 10(b)(2)(ii) requires handlers to pay their pro rata share of the expenses of the Board, except expenses incurred in receiving, handling, holding or disposing of almonds by the Board for the benefit or account of persons other than handlers subject to the Order. Petitioners are handlers subject to the Order; thus they are not exempt from paying their pro rata share of the costs of the Board. 7 U.S.C. § 610(b)(2)(ii) (1988).

23. Sections 981.41, 981.81 and 981.441 of the Order do not violate the First Amendment of the United States Constitution. U.S. Const. amend. I. While the Petitioners' First Amendment rights are implicated, the government has adopted the AMAA to serve compelling state interests, that were ideologically neutral, and that could not have been achieved through less restrictive means. *Frame*, 885 F.2d 1119; 36 Fed. Reg. 20,887, 20,889 (1971); 35 Fed. Reg. 7428, 7432 (1970); 15 Fed. Reg. 3623, 3624 (1950).

24. The creditable assessment rate is not a tax, but rather a lawful delegation by Congress of its authority under the Commerce Clause of the United States

Constitution. *Skinner v. Mid-America Pipeline*, [490 U.S. 212], 109 S.Ct. 1726 (1989); *Frame*, 885 F.2d 1119; 658 F. Supp. at 1479; U.S. Const. art. I, § 8, cls. 1, 3; 7 U.S.C. § 608c(1) (1988).

DISCUSSION

I. Standard and Scope of Review.

The Department's Judicial Officer clearly set forth the standard and scope of review for a hearing pursuant to section 8c(15)(A) of the AMAA in *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 86-91 (1988), *aff'd in part and remanded sub nom., Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-89 EDP (E.D. Cal. June 14, 1989), [*appeal docketed*, No. 90-15505 (9th Cir. Apr. 24, 1990), No. 90-15781 (9th Cir. June 11, 1990)]. Petitioners have the burden of proving that the challenged provisions of the Order and the obligations imposed by it are "not in accordance with law." *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663 (1974), *aff'd*, No. 22-75 (D.D.C. [Aug. 21, 1975)], printed in 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976). As explained in *In re Michaels Dairies, Inc.*, 33 Agric. Dec. at 1701 (citations omitted):

> The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. . . .
>
> The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. . . .

> Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. . . .

The scope of review is the arbitrary and capricious standard as contained in section 706(2)(A) of the APA. 5 U.S.C. § 706(2)(A) (1988). This scope of review is a narrow one as set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted):

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

While the court is not to substitute its judgment for that of the agency, the reviewing court must find that there was a reasoned basis for the Secretary's decision:

> This standard of review is a highly deferential one. It presumes agency action to be valid. . . . Moreover, it forbids the court's substituting its judgment for that of the agency, . . . and requires affirmance if a rational basis exists for the agency's decision. . . .
>
> This is not to say, however, that we must rubber-stamp the agency decision as correct. To

> do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors. . . ." Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful. . . ."

Ethyl Corp. v. EPA, 541 F.2d 1, 34-35 (D.C. Cir. 1976) (en banc), *cert. denied*, 426 U.S. 941 (1976) (citations and footnotes omitted) (quoting *Overton Park*, 401 U.S. at 416). The Secretary must demonstrate a "rational connection between the facts found and the choices made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Thus, Petitioners must prove that the decision of the Secretary was not supported by the record, not merely that another alternative existed, as explained by the Judicial Officer in *Sequoia Orange*, 47 Agric. Dec. at 90:

> [I]t is for the Secretary in his rulemaking capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and . . . even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary.

II. 981.31 of the Order.

Section 981.31 of the Order provides for the membership of the Board:

> Two members and an alternate for each member shall be selected from nominees submitted by each of the following groups designated in paragraphs (a) through (d) of this section, or from among

other qualified persons belonging to such groups; and one member and an alternate member shall be selected from nominees submitted by each of the following groups designated in paragraphs (e) and (f) of this section, or from among other qualified persons belonging to such groups:

(a) The cooperative handlers;

(b) All handlers, other than cooperative handlers;

(c) Those growers who market their almonds through cooperative handlers;

(d) Those growers who market their almonds through other than cooperative handlers;

(e) The group of cooperative handlers or the group of handlers other than cooperative handlers whichever during that part of the then current crop year through March 31 received for their own account more than 50 percent of the almonds delivered by growers; and

(f) Those growers whose almonds were marketed during that period of the then current crop year through March 31, through the handler group specified in paragraph (e) of this section.

7 C.F.R. § 981.31 (1989).

Petitioners first argue that section 981.31 of the Order is not in accordance with law, second that section 981.31 violates their right to due process, equal protection, and constitutes an unlawful delegation of authority, and third that section 981.31 violates section 8c(7)(A) of the AMAA.

First, Petitioners argue that section 981.31 of the Order is not in accordance with law and is not supported by substantial evidence in the rulemaking record, because it allows a majority of the Board's ten positions to be held by persons associated with a single entity, namely the cooperative, Blue Diamond. Petitioners allege that if less than a majority of the members of the Board vote to recommend an action to the Secretary, then that action is not forwarded to the Secretary, thus substantial power is wielded by the Board. With the exception of recommendations for research, development, advertising and promotion, which require seven affirmative votes, all other matters coming before the Board can be passed upon [a majority vote, which, if all 10 members are present, requires] six affirmative votes. 7 C.F.R. §§ 981.40(b), (e) (1989).

Petitioners explain that from 1950 to 1988, Blue Diamond had six seats on the Board every year but three, 1980, 1981, and 1987. (Tr. 216-17; St. ¶ 12) Since the mid-1970's the members of the Board representing the cooperative, Blue Diamond, have always voted in unison with each other. (Tr. 215-16, 219) But the members of the Board representing the independent handlers and growers have not always voted in unison. (Tr. 219) As a result, the cooperative not only has the majority representation on the Board, but may bloc vote against recommendations by the independent handlers and growers.

Petitioners note that the Secretary was aware that the views of the cooperative and the independent handlers and growers of industry problems differed:

> A board on which each of the industry groups of growers and handlers is represented would be fair

> and equitable. The representation on the board of the six industry groups by 10 members would give adequate representation to growers and handlers. Distinction should be made between cooperative handlers and other than cooperative (or independent) handlers, because these groups tend to have somewhat different views on various almond marketing problems. Each is of importance to the almond industry and each should, therefore, be represented on the board. Likewise, the growers marketing through cooperative handlers and the growers marketing through other than cooperative handlers should be given separate representation for the same reason. The granting of two member representatives to each of the aforementioned groups would, of course, result in an even balance of representation as between handlers and growers and as between the cooperative and other than cooperative segments. However, it is fair and equitable that majority representation on the board at any given time should be had by the then current dominant handler, judged in terms of the relative quantity of almonds handled.

Notice of Recommended Decision, 15 Fed. Reg. 3623, 3628 (1950). The Secretary acknowledged that Blue Diamond handled sixty-four percent of the previous crop and as a result would immediately have six seats on the Board. *Id.* The Secretary stated that a majority vote would be required by the Board in accord with usual business practice:

> All decisions of the control board, except where otherwise specifically provided, should be by a majority vote of the members present. The presence of six members should be required to con-

> stitute a quorum. The fixing of the majority of the membership as a quorum and the making of decisions as to relatively routine matters on the basis of the majority of the members present, so long as there is a quorum, are in accordance with usual business practice.

Id. at 3630.

In the Decision, the Secretary speculated that the cooperative would vote as a unit and that the independent handlers and growers would vote as a unit:

> While, at the beginning, the cooperative group would have majority representation on the board by reason of the fact that it handles the greater portion of the almond crop, there is no certainty that this situation will continue indefinitely. There was also a strong indication at the hearing that the independent group would also tend to vote as a unit in that regard. Therefore, to require the affirmative vote of seven members would, in effect, amount to a requirement for the unanimous vote of the board, which, in the circumstances, would seem to be an impracticable requirement.

Decision With Respect to a Proposed Marketing Agreement and Order, 15 Fed. Reg. 4272 (1950). Petitioners argue that the Secretary's findings support their claim that the Secretary intended to render meaningless the representation of the independent handlers and growers on the Board.

Petitioners contend that the Secretary's decision to allow a single entity to hold a majority of the seats on the Board, and to require only six votes for recommendations to the Secretary was arbitrary and capricious, and not supported by substantial evidence in

the record. Petitioners cite to section 8c(6) of the AMAA arguing that Congress expressly determined that marketing order provisions were to be equitable and that Congress never intended that the Board be dominated by the competitors of the independent handlers and growers.

Respondent explains that the assertion by Petitioners that the majority representation of the Board, by Blue Diamond, precludes the minority positions from ever reaching the Secretary is false. The positions of the minority are submitted to the Secretary. The minutes of the Board meetings along with reports are sent to the Secretary. (Tr. 435-36)

Respondent argues that Petitioners have not met their burden of proof. Respondent explains that Petitioners have not cited evidence that indicates that there was no support for the Secretary's decision, but instead Petitioners argue alternative ways of forming Board membership. Respondent further contends that Petitioners confirmed that the rule-making record illustrates that the Secretary's decision was based on reasoned decision making by its quotes from the Recommended Decision and the Decision.

When establishing the Order, the Secretary acknowledged that there were two entities in the almond industry—the cooperative and the independent handlers and growers. The Secretary noted that the views of the two groups tend to be different. The Secretary emphasized that each group is of importance to the almond industry and therefore should be represented on the Board.

The Secretary drafted the regulations specifying membership of the Board, knowing that Blue Diamond would initially maintain six of the ten seats on the

Board and that it was likely to bloc vote their six votes. The Secretary also speculated that the independents might bloc vote their votes. The Secretary provided that if the independents did not agree with Blue Diamond's views, their views would be considered carefully by the Secretary before he reached his final decision:

> In other words, in case the independent group should not agree with the estimates and recommendation adopted by the board, its views together with all data in support thereof, would still be considered carefully by the Secretary before he reaches his final decision. The proposed way of handling is consistent with the way of handling the matter which has been followed in regulatory programs of this kind involving other tree nuts, and, in those other programs, it has happened on a number of occasions, that the Secretary has not followed the recommendations of the administrative agency when other data available to him has indicated that he should not do so.

15 Fed. Reg. 4272 (1950).

The views of the minority are submitted to the Secretary through the Board's minutes and reports. Petitioners have failed to show that the minority's view on any recommendation was not considered by the Secretary.

Although Blue Diamond can bloc vote their six votes, this is not a violation of the AMAA. The Judicial Officer addressed this issue in *Sequoia Orange*, 47 Agric. Dec. at 202-05, explaining that the AMAA was designed to benefit cooperative associations. As stated in the Senate Report in relation to the AMAA:

> The operations of cooperative marketing associations will be reenforced by these sections, which will assure the cooperation of processors and distributors in programs intended to raise farm prices.

S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935). Further, the Supreme Court has approved of bloc voting by dairy cooperatives under the AMAA. *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 559-60 (1939); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 286-89 (1977), *aff'd*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1077 (1980).[6] The importance of cooper-

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[6] [*Sequoia Orange*, *supra*, states (47 Agric. Dec. at 202):

In addition, as stated in *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 286-89 (1977), *aff'd*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1077 (1980):

Moreover, the Supreme Court has expressly approved block voting by dairy cooperatives under the Act even if the effect of the Order gives the cooperatives a monopoly of the market. Specifically, the Court held in *United States v. Rock Royal Co-op.*, 307 U.S. 533, 559-560:[7]

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[7] See, also, *H. P. Hood & Sons v. United States*, 307 U.S. 588, 599.

> It is quite true that the League [*i.e.*, a cooperative] which itself cast two- thirds of the favorable votes was in a position to cast more than one-third of the total qualified vote against the Order. This arises from the provision of the Act [7 U.S.C. 608c(12)], authorizing cooperatives to express the approval or disapproval for all of their members or patrons. This is not an

atives is explained in [*Sequoia Orange, supra*, 47 Agric. Dec. at 20304, quoting from] *Lamers Dairy*, [36 Agric. Dec.] at 287-88 . . .:

The programs for the regulation of milk marketing under the Act [AMAA] are largely an extension and continuation of the work of cooperative marketing associations prior to this legislation.[8]

It was recognized early in the administration of the Act that without a strong cooperative in a milk market "the cornerstone for a successful program is lacking." *Report of the Associate Administrator of the Agricultural Adjustment Administration, in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal*

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unreasonable provision, as the cooperative is the marketing agency of those for whom it votes. If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. *If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act* or justify the refusal of the injunction. [Footnotes omitted; emphasis supplied.]

[8] See, *Economic Standards of Government Price Control*, Monograph No. 32 (76th Cong., 3rd Sess., Senate Committee Print for the Use of the Temporary National Economic Committee in the Investigation of Concentration of Economic Power), pp. 58-59; Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 192-196; Bartlett, *Cooperation in Marketing Dairy Products*, pp. 188-210; *Agricultural Cooperation in the United States* (Farm Credit Administration, April 1947), p. 45 *et seq.*]

Surplus Commodities Corporation (1939), p. 31. "It would be impossible to have the type of regulatory program which exists today without strong cooperative organizations." *Id.* at p. 30. [See, also, Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 467-478; Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), pp. 267-268.]

The distinction under the Act between cooperatives and other handlers, and the encouragement to be given cooperatives under Federal Milk Orders, was recognized in *United States v. Rock Royal Co-op., supra*, 307 U.S. 533, 562-564, as follows:

> Different treatment has been accorded marketing cooperatives by state and federal legislation alike. Indeed the Secretary is charged by this Act to "accord such recognition and encouragement to producer-owned and producer- controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress,[9] and as will tend

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[9] [Numerous acts of Congress deal with cooperatives differently from proprietary business enterprises, and enunciate the policy of aiding and encouraging the establishment, operation, and growth of marketing cooperatives. Some of the instances of the Congressional policy of special consideration for, and treatment of, cooperatives are in the Agricultural Marketing Act of June 15, 1929 (12 U.S.C. 1141, 1141j); the Clayton Act (15 U.S.C. 17); the Capper-Volstead Act (7 U.S.C. 291); the Robinson-Patman Act of June 19, 1936 (15 U.S.C. 13b); the Commodity Exchange Act (7 U.S.C. 10a); and the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2301 *et seq.*). See, also, Nourse, *The Legal Status of Agricultural Cooperation*, pp.

to promote efficient methods of marketing and distribution." [7 U.S.C. 610(b)(1)]. These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment.

[* * *]

[The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons. [Footnotes omitted.]

[Similarly, the favored position of producers under the Act (which includes, of course, cooperatives) was expressed in *In re Michaels Dairies, Inc.*, 33 Agr Dec 1663, 1709 (1974), affirmed *sub nom. Michaels Dairies v. Butz*, [No. 22-75] 34 Agr Dec 1319, 1320, 1323 (D.C. D.C. [Aug. 21, 1975]), affirmed, [546] F.2d [1043] (No. 75-2023, C.A. D.C., decided December 17, 1976), as follows:

[Where there is a clash of interests between the handlers on the one side and the producers and consumers on the other, the statute provides a

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241-266; and Hulbert, *Legal Phases of Co-operative Associations* (Farm Credit Administration, May 1942), pp. 307-322.]

clear-cut basis for resolving the clash. Orders issued under the Act are "principally for the economic protection of producer and consumer" (*United States v. Mills*, 315 F.2d 829, 837 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819). The Act provides for the issuance of marketing Orders with or without handler approval (7 U.S.C. 608c(8) and (9)). In practice, almost no handler ever agrees to sign a milk marketing agreement, and all of the approximately 60 milk Orders were promulgated after the handlers refused to agree to the programs. It is not unusual for handlers such as petitioner to be unhappy with a program designed to regulate them for the benefit of producers and consumers.]

The Judiciai Officer has declared that with respect to the Supreme Court's approval of bloc voting by dairy cooperatives, "the same reasoning is, of course, applicable to cooperatives handling navel oranges." *Sequoia Orange*, 47 Agric. Dec. at 204. This reasoning also applies to cooperatives handling almonds.

The Judicial Officer points out that this type of issue is more appropriate for a rulemaking hearing, rather than a section 8c(15)(A) hearing. Blue Diamond's dominant role [on the Board] is a result of the Order and is entirely consistent with the congressional purpose of this regulatory program. *Id.* at 205.

Therefore, the Secretary's decision was not arbitrary and capricious and was supported by substantial evidence in the record. The Secretary considered the fact that Blue Diamond might dominate the Board, but found that the composition of the Board was equitable.

Petitioners also argue that section 981.31 of the Order violates section 8c(6) of the AMAA. 7 U.S.C. § 608c(6) (1988). Section 8c(6) is not applicable. It provides that the handling of a commodity shall be equitable among the handlers. This provision does not involve the composition of industry committees.

In support of their argument that composition of the Board is unfair, Petitioners cite to *Gibson v. Berryhill*, 411 U.S. 564 (1973), where the pecuniary interest of members of the Board of Optometry disqualified them from membership on the board. The board members were optometrists in private practice, who would be considering the revocation of licenses of optometrists that worked for business corporations, their competitors.

This case is not applicable to the facts present here. The board in *Gibson* functioned in an adjudicatory manner with the power to revoke the licenses of their competitors. The Almond Board does not have adjudicatory functions, nor does the Board have any decision making power that could directly put the Petitioners out of business. The Board has only the power to make recommendations to the Secretary. The Secretary has final approval of all Board actions. 7 C.F.R. §§ 981.38, .40(d) (1989).

Second, Petitioners argue that section 981.31 of the Order violates their right to due process, equal protection and constitutes an unlawful delegation of authority.

Petitioners argue that the Board is allowed to make law. Petitioners refer to arguments that appear later in its brief explaining the specific instances where the Board made law.

Petitioners contend that the Due Process Clause of the United States Constitution does not allow the

Secretary to set up the Board in such a way that one entity can dominate the Board. U.S. Const. amend. V. Petitioners argue that Congress never intended this result.

Petitioners' argument centers on their allegation that recommendations are made only to the Secretary upon a majority vote of the Board and that this is unfair since the independent growers and handlers can never have a majority vote, and as a result cannot make recommendations to the Secretary. In their reply brief, Petitioners alter their argument, stating that the Secretary is only asked to engage in rule-making when the Board makes a recommendation that has been voted upon unanimously by the Board members. Petitioners assert that the Secretary never addresses the dissenting point of view unless it is contained in a written statement to the Secretary in response to the issuance of a proposed rule and an invitation to comment.

Petitioners also argue that they have been denied equal protection of the laws as guaranteed by the United States Constitution. U.S. Const. amend. V. Petitioners explain that the discrimination is based upon voting rights, membership, majority control, and the association with either the independent handlers and growers or the cooperative.

Respondent argues that there is no unlawful delegation of authority as the Secretary has retained all of the enforcement and implementation authority:

> (d) *Right of the Secretary.* The members of the Board (including successors or alternates), and any agent or employee appointed or employed by the Board, shall be subject to removal or suspension by the Secretary at any time. Each

> and every order, regulation, decision, determination, or other act of the Board shall be subject to the continuing right of the Secretary to disapprove of the same at any time, and, upon such disapproval, shall be deemed null and void except as to acts done in reliance thereon or in compliance therewith.

7 C.F.R. § 981.40(d) (1989). Respondent explains that constitutional challenges directed against marketing orders because of their administration by industry members have been specifically denied for this reason. *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); *Whittenburg v. United States*, 100 F.2d 520, 522-23 (5th Cir. 1938). *See also, Vaughn-Griffin Packing Co. v. Freeman*, 294 F. Supp. 458, 467-68 (M.D. Fla. 1968), *aff'd*, 423 F.2d 1094 (5th Cir. 1970); *See also, Sequoia Orange*, 47 Agric. Dec. at 180-85 (Judicial Officer holds that California-Arizona Navel Orange Regulatory Program does not constitute an unlawful delegation of authority). The Third Circuit in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, ___ U.S. ___, [110] S. Ct. 1168 (1990), rejected the claim that an industry committee's administration of the Beef Promotion and Research Act constituted an unlawful delegation of authority. The Beef Promotion and Research Act was modeled after the AMAA. The court first found that Congress had not unlawfully delegated authority to the Secretary:

> It is plain that the Beef Act does not unlawfully delegate legislative authority to the Secretary. "So long as Congress provides an administrative agency with standards guiding its action such that a court could ascertain whether the will of

> Congress had been obeyed, no delegation of legislative power has occurred." *Skinner v. Mid-America Pipeline*, [490 U.S. 212], 109 S.Ct. 1726, 1731, (citing *Mistretta v. United States*, [488 U.S. 361], 109 S.Ct. 647, (1989)).

Frame, 885 F.2d at 1128. In fact, the court found that "under the Beef Promotion Act, Congress has delegated to the Secretary far less discretion than the Supreme Court has previously sanctioned in applying the non-delegation doctrine." *Id.*

The Act directed the Secretary to promulgate a Beef Promotion and Research Order. The Act further provided for a Cattleman's Beef Promotion and Research Board to administer the order under the supervision of the Secretary. Next, the court found that the Secretary had not unlawfully delegated authority to the board. The court applied the standard used in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), where pursuant to the Bituminous Coal Act of 1937, members of the coal industry were authorized to fix minimum prices for Bituminous Coal Code members in accordance with stated standards, with final approval from the agency charged with administering the Act:

> The members of the code function subordinately to the Commission. [The Commission] not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.

Frame, 885 F.2d at 1128. The *Frame* court stated:

> [W]e find that the amount of government oversight of the program is considerable, and conclude that no lawmaking authority has been entrusted to the members of the beef industry. Both the Act and the Order render the actions of the Cattlemen's Board subject to the Secretary's pervasive surveillance and authority.

Id. at 1128-29. As noted by the court, "all budgets, plans or projects approved by the Board become effective only upon final approval by the Secretary. . . ." *Id.* at 1129 (citation omitted).

There is no unlawful delegation of authority here. As Respondent explains, the Secretary has retained all of the enforcement and implementation authority under the Order. The Almond Board submits all budgets, plans, projects and recommendations to the Secretary for his approval. The Secretary has the final approval of all Board actions. The Board acts subordinately to the Secretary. "Congress may entrust administrative activities to an industry group, without violation of the nondelegation doctrine, . . . if the industry members function subordinately to a government agency." *Sequoia Orange*, 47 Agric. Dec. at 182. While Petitioners claim that the Board makes law and that examples of these instances appear later in their brief, they are unable to provide an example of where the Board has acted without prior approval from the Secretary. The Board has no lawmaking functions and the Secretary retains ultimate authority. Therefore, there is no unlawful delegation of authority.

Petitioners state that *Chiglades Farm* and *Whittenburg* are inapplicable. On the contrary they are directly applicable. In *Chiglades Farm*, 485 F.2d

at 1134, the plaintiffs argued that the composition of the Florida Celery Committee vested control of the industry in a group of self-interested producers and deprived them of due process of law. The plaintiffs contended that, despite the Secretary's ultimate authority, he exercised no independent judgment. The court found that the Secretary had the ultimate authority and that the checks on the committee's powers were effective. In *Whittenburg*, 100 F.2d at 522, the plaintiffs argued that the AMAA is an unconstitutional delegation of legislative powers. The court found that the industry committee had not been given any legislative power and that any action taken was always that of the Secretary.

Respondent states that Petitioners' arguments that section 981.31 of the Order violates their right to due process and equal protection of the laws are based on long discredited theories and therefore, should be rejected. Respondent explains that no economic regulation has been invalidated on substantive due process grounds since 1937, and that equal protection is also no longer used to invalidate an economic regulation. G. Gunther, *Constitutional Law*, 441, 472 (1985).

I agree with Respondent that due process and equal protection are no longer viable arguments with which to invalidate economic regulations [such as those involved here]. The Supreme Court demonstrated that it intends to take a [more] "hands-off" approach to economic legislation:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . .

> The doctrine that prevailed in *Lochner*, . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) (referring to *Lochner v. New York*, 198 U.S. 45 (1905)). *Accord*, *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

Respondent further argues that even if Petitioners' arguments were considered, they would fail, as the Secretary has a rational basis for the regulation and that is all that is required.

The modern due process analysis regarding an economic regulation is summarized in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955): "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Respondent explains that the rational basis for the Order is to promote the orderly marketing of California almonds, thereby increasing returns to producers and stabilizing the agricultural industry which would be in the public interest.

Respondent explains that the proper standard for Petitioners' equal protection argument is that the regulation must bear some "rational relationship to a legitimate state purpose." *City of Dallas v. Stanglin*,

[490 U.S. 19], 109 S. Ct. 1591, 1594 (1989). The rational basis test "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Id.* at 1596. Respondent argues that the rational basis test is satisfied. The Secretary made a decision to establish a provision that majority membership on the Board would be determined by the amount of almonds handled in the previous year. This was equitable because there are two entities of almond handlers and growers.

Section 981.31 of the Order does not deny Petitioners their right to due process and equal protection under the law. Petitioners simply argue that they are denied due process and equal protection but never explain through constitutional analysis why. In their reply brief, Petitioners state that they believe that a stricter scrutiny than the rational basis test should be applied, but never provide any explanation or support for this argument. The law is clear that all that is required for review of a due process challenge is a rational basis for the regulation. *Lee Optical*, 348 U.S. at 488. The rational basis standard is also the appropriate standard to be applied to Petitioners' equal protection argument. The Court in *City of Dallas*, 109 S. Ct. at 1594, held that the rational basis test was the proper standard to be applied to an economic regulation that did not implicate a suspect class or impinge upon constitutionally protected rights. Petitioners do not assert that they are a suspect class, and it has been decided that it does not impinge upon constitutionally protected rights. While the Equal Protection Clause of the United States Constitution is only applicable to the states through the Fourteenth Amendment, the Court has made the equal protection guarantee ap-

plicable to the federal government through the Fifth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Therefore, the Secretary need only show that section 981.31 of the Order bears some rational relationship to a legitimate purpose. I have already decided that the Secretary's decision relating to the composition of the Board was supported by substantial evidence in the rulemaking record. Thus, there is a rational relationship to a legitimate purpose. The purpose was to set up the Board to administer the Order. The Secretary gave four seats to each entity in the industry, with the last two seats going to the entity that handled the most almonds in a given year. The AMAA, which provided that the Secretary may set up the Board, benefits cooperatives. This decision was made by Congress, and, until the AMAA is amended, cooperatives will be able to dominate industries regulated by marketing orders.

In support of their argument that they are denied equal protection of the laws, Petitioners cite to two recent cases. The first is *Board of Estimate v. Morris*, [489 U.S. 688], 109 S. Ct. 1433 (1989), which held that the composition of the board of estimate for the City of New York, representing boroughs having widely disparate populations, but equal representation on the board, violated the Equal Protection Clause of the United States Constitution. The Court found that the "one person, one vote" requirement of the reapportionment cases was applicable because all officials on the board were selected by popular vote. The Court also found of major significance that the board shared legislative functions with the city council. *Id.* at 1439.

This case is inapplicable to the present situation. The Court explains that the equal protection guarantee of "one person, one vote" is applicable to congressional districting plans, state legislative districting, and local government apportionment. *Id.* at 1437. The members of the Almond Board are not elected by popular vote, thus the equal protection guarantee of "one person, one vote" is not triggered. The Board is not a legislative body exercising legislative functions.

The second case is *Quinn v. Millsap*, 490 U.S. [95], 109 S. Ct. 2324 (1989), which held that the requirement that one had to be a landowner to be a member of a board to consider reorganization of governmental structures and responsibilities for the City and County of St. Louis, violated the Equal Protection Clause of the United States Constitution. The Court found that "the Equal Protection Clause protects the `right to be considered for public service without the burden of invidiously discriminatory disqualifications. . . .'" *Id.* at 2331.

This case is also inapplicable. In *Quinn*, the requirement of landownership was a total blockade for membership of the board: "[I]t is a form of invidious discrimination to require landownership of all appointees to a body authorized to propose reorganization of local government." *Id.* at 2331-32 (emphasis added). Here, Petitioners are not questioning their right to participate, but they are questioning how much representation they have. These are two very different issues. There is also some question whether *Quinn* is at all relevant since it is dealing with the composition of a governmental body, as was *Board of Estimate*. Further, Petitioners have not demonstrated that they are victims of invidious discrimination. Finally, if the equal protection guarantee

was triggered, all that would be required is a rational basis for the regulation. *Quinn*, 109 S. Ct. at 2332. As has already been decided, there is a rational basis for the composition of the Almond Board.

Third, with regard to section 981.31 of the Order, Petitioners argue that it violates section 8c(7)(A) of the AMAA. 7 U.S.C. § 608c(7)(A) (1988). Section 8c(7)(A) provides:

> Terms common to all orders
>
> (7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:
>
> (A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

Petitioners contend that section 8c(7)(A) should be construed as mandatory and not permissive. Petitioners explain that while the language indicates that Congress did not require the Secretary to include all of the subsections of section 8c(7), that as a matter of law statutes should be construed and interpreted in such a manner to avoid any violation of the United States Constitution. Thus, if the AMAA is construed as permitting the Secretary to allow a single entity to unfairly compete with its competitors, that is a violation of the Petitioners' guarantee to equal protection and there is no rational basis to support section 981.31 of the Order. Petitioners argue that to permit the Secretary to allow the Board to be dominated by one entity would render moot section 8(d)(1) of the AMAA, which requires the Secretary to pre-

vent an abuse of the privilege of exemptions from the antitrust laws. 7 U.S.C. § 608d(1) (1988).

Respondent [correctly] argues that section 8c(7)(A) is permissive and not mandatory. In addition, Respondent [correctly] explains that section 8c(7)(A) is not a provision requiring anything, so it cannot be violated.

In determining the meaning of a statute, interpretation begins by examining the plain language of the statute. *Mallard v. United States District Court*, [490 U.S. 296], 109 S. Ct. 1814, 1818 (1989). The plain language of section 8c(7)(A) states that "orders shall contain one or more of the following terms and conditions." This language is clearly permissive, not mandatory. A term or condition listed in section 8c(7)(A)-(D) may be part of a marketing order, but is not required. Thus, the Secretary is not required to make section 8c(7)(A) part of the Order.

Further, there is no need to construe the Order to prevent a violation of the United States Constitution; as has already been decided, the Order does not violate the Petitioners' right to equal protection under the laws.

Petitioners' argument that section 8d(1) is rendered moot by section 981.31 of the Order is misplaced. Section 8d(1) refers to the disclosure of information. Section 8d(1) provides in relevant part:

> (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effec-

> tuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. . . .

7 U.S.C. § 608d(1) (1988). This provision does not state that the Secretary shall prevent an abuse of antitrust laws; rather, it provides for the release of information to the Secretary for a determination to see if an abuse has occurred. Petitioners do not explain how this section of the AMAA is relevant.

III. The Market Development Program [and Reserve Obligations].

The Almond Butter Market Development Program ("Program") was instituted in 1982. The purpose of the Program [and the 1982-crop reserve obligations were] explained by the Secretary in the final rule [establishing the 1982-crop saleable and reserve percentages] (RX 4):

> [The remaining two percent (6.8 million pounds) of the 1982 marketable production must be withheld by handlers to meet their reserve obligations.] These almonds [reserve almonds] will be available to develop outlets noncompetitive with normal domestic and export outlets. The development of such outlets is a long-term necessity for the industry because of anticipated larger crops. The Board plans to use the reserve to develop a market for almond butter and has presented an industry-wide project. The Board's objective is to develop a permanent consumer demand for almond butter and related products that, in time, will absorb a large quantity of almonds. To insure

> success with this project, the Board believes that initially it is necessary to keep almond butter competitive with peanut butter, which currently dominates the market. In addition, the Board plans to promote the use of almonds in school lunch programs with the objective of encouraging school authorities to buy almonds for those programs on a regular basis. Reserve almonds could also be disposed of in other eligible noncompetitive outlets authorized by the order.

There was considerable energy expended by the parties over whether to refer to the Program as the "Almond Butter Program" or the "Market Development Program." However, what is important is not the name, but the substance of the Program.

Petitioners have three arguments relating to the Program: (1) the Program lacked a rational basis in the rulemaking record; (2) the Secretary erred by failing to specify in the final rules the percentage of the reserve to be allocated to the Program for the crop years 1984-86; and (3) the Secretary should have allowed notice and comment on the determination of the minimum prices [required to be charged to buyers] and special assessments on almonds disposed of under the Program.

First, Petitioners argue that the Program lacked a rational basis in the rulemaking record. Petitioners contend that there was no justification to impose the reserve to develop a market for almond butter. There was no explanation in the 1982 final rule to indicate that almond butter could compete with peanut butter, that such a program would be successful, or that the industry actually needed a butter program in anticipation of larger crops.

Petitioners argue that a reserve cannot be imposed unless it is for supply management and that this reserve was not supply management. Petitioners rely on the report of the AMS field agent: "Obviously a 2% reserve is not supply management in any sense, but such establishment is necessary in order to give the industry an opportunity, on a uniform basis, to develop an almond butter market." (RX 7)

Petitioners assert that the reserve imposed for the 1983-84 crop year, with respect to the Program, was even more arbitrary and capricious than it was for the previous year. For the 1982-83 crop year, there were 340 million pounds of marketable supply produced in California, with a trade demand of 360 million pounds. (RX 4) For the 1983-84 crop year, there were 230 million pounds of marketable supply, with a trade demand of 320 million pounds. (RX 16) Thus, for the 1983 crop year, there was a difference of 90 million pounds needed to supply the trade demand, while in 1982, there was only 20 million pounds needed. For the 1983 crop year, the Secretary imposed a three percent reserve (6.9 million pounds) which could only be used for sale into almond butter or non-competitive outlets such as cattle feed. (RX 16 [; 7 C.F.R. § 981.66(c)]) Petitioners contend that the reason the 1983-84 reserve was more arbitrary than the 198283 reserve was that in the 1983-84 final rule, the Secretary stated that most of the two percent reserve in 1982-83 went to inedible outlets rather than into almond butter. (PX 16)[7]

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[7] [Petitioners overlook the carryover statistics, which destroy their argument. The estimated supply to satisfy the estimated demand for a particular crop year consists of the carryover from the prior year (i.e., the almonds from the prior

Petitioners contend that the reserve amounts for 1984-85 and 1985-86 crop years were not supported by substantial evidence in the rulemaking record. Petitioners argue that the Secretary did not independently, from the Board's recommendation, perform any analytical and judgmental functions to determine if the recommended reserve was justified. Further, the Secretary's basis and purpose statement was not

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year's crop still on hand at the beginning of the crop year) plus the estimated production. Consideration must also be given to the amount desirable to be carried over at the end of that crop year for early season shipments during the following crop year (before the following year's crop is available for market). The following statistics are set forth in the Secretary's final rules for the 198283 crop and the 198384 crop (RX 4; PX 16):

	1982-83 Crop	1983-84 Crop
	Million Pounds	*Million Pounds*
Carryover from Prior Year	161	178.9
Est. Production	*340*	*230.0*
Total Supply	501	408.9
Est. Demand	360	320
Est. Desirable Year-end Carryover	*134.2*	*82*
Demand + Year-end Carryover	494.2	402
Est. Surplus	6.8 (2%)	6.9 (3%)

Hence, considering the total estimated supply and demand situations, there was an estimated 2% surplus for the 1982-83 crop (6.8 <<triangle>> 340 = .02) and an estimated 3% surplus for the 198384 crop (6.9 <<triangle>> 230 = .03). As shown in the Additional Conclusions by the Judicial Officer, § I, there was an estimated 25% surplus for the 1984-85 crop and an estimated 20% surplus for the 1985-86 crop.]

sufficiently detailed and informative to explain the reason for the reserve. 5 U.S.C. § 553(c) (1988).

Respondent argues that the Secretary had a substantial basis in the rulemaking record for the institution of the reserve for the crop years 1982-1986. The purpose of the Program was to develop a market which would reduce future surpluses, provide additional outlets for almonds, such as almond butter, and as a result, increase grower returns. (RX 6, p. 33) For each rule, the Secretary reviewed transcripts of Board meetings, minutes, reports from the AMS field agent and various other documents, including resolutions, correspondence among industry members, and recommendations. Respondent explains that those documents were replete with support for a reserve to create a market for almond butter. Respondent notes that the Board vote on the recommendation, for the nine rules establishing reserves during the four-year Program, was unanimous eight of the nine times. (RX 2) There were nine rules because, for the 1984-85 and 1985-86 marketing years, there was more than one rule, as the reserve percentage was changed.

The Secretary's decision to institute the Program was supported by substantial evidence in the rulemaking record. The Secretary in his rulemaking capacity is required to make policy judgments. Petitioners must demonstrate that those judgments were arbitrary and capricious and not supported by evidence in the record. Petitioners have not met that burden. The Secretary had a considerable amount of information before him consisting of Board meeting minutes, transcripts and reports, as well as the AMS field agent reports. (1982-83 crop year: PX 34, 36; RX 3, 4, 5, 6, 7, 15. 1983-84 crop year: PX 16, 41, 42; RX 18, 22, 24, 28. 1984-85 crop year: PX 46, 47, 48; RX 31, 35,

36, 37, 39, 40, 55; revisions: PX 19, 20, 21; RX 41, 44, 45, 46, 48, 49, 50, 52, 53, 59, 60. 1985-86 crop year: RX 56, 66, 67, 68, 69, 79, 80, 90; revisions: PX 23, 24, 61; RX 71, 72, 73, 77, 78.) The record was ample and sufficient for the Secretary to determine whether the Program would help meet the needs of the industry.

Petitioners did not meet their burden of proof with regards to the argument that a reserve cannot be imposed unless it is for supply management. Petitioners did not provide any support for this proposition. [Furthermore, the large anticipated surpluses for the 1984-85 crop and the 1985-86 crop *required* that a reserve be established for those years (see Additional Conclusions by the Judicial Officer, § I), irrespective of the Program, and the small anticipated surpluses for the 1982-83 crop and the 1983-84 crop would have authorized a reserve for those years, irrespective of the Program.]

With regard to Petitioners' argument that the rule imposing the reserve for the 1983-84 crop year was more arbitrary and capricious than the rule for the 1982-83 year, because most of the reserve went to inedible outlets, the Secretary explains that the Program was new to the industry and it required a considerable start-up period. (PX 16) [Moreover, see note 7, *supra*.]

Petitioners provide no support for their argument that the Secretary did not independently, from the Board's recommendation, perform any analytical and judgmental functions to determine whether the recommended reserve amounts should have been adopted. Simply because the Secretary adopted the Board's recommendation does not lead to the conclusion that the Secretary rubber-stamped the Board's recommendations. The AMAA provides for a

close working relationship between the Secretary and industry committees. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). Congress recognized the need to have industry committees comprised of experts in the respective industry to make recommendations to the Secretary:

> To the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the Agricultural Marketing Agreement Act of 1937, and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of the industry in how best to market a crop.

H.R. Rep. No. 271, 99th Cong., 1st Sess. 193. The court in *Chiglades Farm*, 485 F.2d at 1134, explained Congress' recognition that those with "the greatest knowledge of the industry's needs," the industry committees, would be qualified to make the necessary recommendations to the Secretary to benefit the industry.

The Secretary's decision as to the reserve amount for marketing years 1984-85 and 1985-86 was not arbitrary and capricious. As discussed previously, the Secretary had before him all of the information from the Board with respect to the amount of reserve that was recommended and why. The Secretary had already approved of the Program, and almonds needed to be allocated for the Program [, and there was an estimated 25% and 20% surplus, respectively, for those years (see note 7, *supra*)]. There was substantial evidence in the rulemaking record to support the amount of the reserve for the years 1982-86.

The basis and purpose statements for the rules imposing the reserves from 1984-86, for the Program

were "sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted." *Amoco Oil Co. v. EPA*, 501 F.2d 722, 739 (D.C. Cir. 1974). The reserve for the Program had been utilized since 1982. The basis and purpose of the reserve was clear by this time. The purpose of the reserve was to establish a market for almond butter to absorb the anticipated surpluses from the crops. This purpose was certainly reflected in the proposed and final rules. (RX 35, 36, 66, 67) The Secretary also responded to comments received after publication of the proposed rule. These rules did not differ from the ones imposing the reserve for the Program for the years 1982-83 and 1983-84.

. . .[8]

IV. Extension for Disposition of Reserve Almonds.

. . .[9]

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[8] [The omitted material is the ALJ's discussion of his conclusions 8 and 10, which state (Initial Decision at 19, 20):

8. The Secretary was in error by not specifying the percentage of the reserve almonds to be allocated to the Program. (RX 36, 67) The allocation of the reserve to the Program had a substantial impact upon the rights and interests of the handlers and should have been promulgated through APA rulemaking. 7 U.S.C. § 553 (1988).

. . . .

10. The Secretary should have promulgated the determination of the minimum prices and special assessments on almonds disposed of under the Program through APA rulemaking. The minimum prices and special assessments were substantive in nature and affected the handlers' disposition of their reserve almonds. 5 U.S.C. § 553 (1988).

For the Judicial Officer's contrary conclusions, see Additional Conclusions by the Judicial Officer, §§ I, II.]

V. Section 981.441 of the Order.

Section 981.441 of the Order establishes the standards for crediting for marketing promotion including paid advertising. 7 C.F.R. § 981.441(a) (1989). The authority for section 981.441 is found in section 981.41 of the Order which permits the Board, with the approval of the Secretary, to establish research and development projects [and marketing promotion projects (including paid advertising),] and to credit the pro rata expense assessment obligations of a handler. 7 C.F.R. § 981.41 (1989).

Petitioners have four arguments with respect to section 981.441: (1) section 981.441 is not in accordance with sections 8c(6)(I) and 10(b)(2)(ii) of the AMAA; (2) section 981.441 is not in accordance with section 8c(10) of the AMAA; (3) section 981.441 should have been promulgated through formal rulemaking; and (4) section 981.441 is an unlawful delegation of authority by the Secretary to the Board.

First, Petitioners argue that section 981.441 is not in accordance with sections 3c(6)(I) and 10(b)(2)(ii) of the AMAA. 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii) (1988). Section 8c(6)(I) provides (emphasis added):

> (I) Establishing or providing for the establishment of production research, marketing research and development projects designed to

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[9] [The omitted material is the ALJ's discussion of his conclusion 12, which states (Initial Decision at 20):

> 12. The Secretary should have allowed notice and comment on the rule issued on or about August 20, 1986, extending the date for disposing of reserve almonds from September 1, 1986, to March 1, 1987. (PX 25, 62, 63; RX 75, 87, 88).

For the Judicial Officer's contrary conclusions, see Additional Conclusions by the Judicial Officer, § III.]

assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds . . . *such projects may provide for any form of marketing promotion including paid advertising and* with respect to almonds . . . *may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order* and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

Section 10(b)(2)(ii) states (emphasis added):

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified

by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

Petitioners explain that a handler may advertise and apply for credit towards his . . . assessments. (Tr. 237) If a handler does not advertise, or if the handler advertises but does not receive credit for his advertisements, the handler must pay his assessment directly to the Board. The money collected by the Board is used for administrative purposes. The Board does not engage in any paid advertising, but does [other] promotional work. Each year a public relations and advertising budget [, which includes *all* of the Board's anticipated expenses for the year,] is

developed for the Board. The budget is submitted to the Secretary for approval. (Tr. 317-19, 429; St. ¶ 7)

Petitioners argue that since the Board does not have an advertising campaign and does not engage in paid advertising, the Board cannot assess the handlers. Petitioners contend that the Secretary only intended for the Board to assess the handlers, if the Board itself had an advertising campaign. Petitioners cite to the Secretary's Recommended Decision with respect to the creditable advertising assessments explaining that the Secretary distinguished between paid advertising and promotional work:

> Although most of the evidence concerned itself with paid media advertising which should be creditable, the act also provides for crediting applicable to marketing promotion activities. While it was agreed by all witnesses that it is extremely difficult to distinguish between paid media advertising and marketing promotion activities, certain activities were referred to which should be considered as marketing promotion. These include point of sale material, public relation work, trade fairs, food page ads and supplements. *At some future time, the Board may want to consider crediting handler expenses for such marketing promotion activities.* However, before any handler receives credit for such activities, the Control Board, with the approval of the Secretary, should issue appropriate rules and regulations defining areas of creditable marketing promotion activity.

36 Fed. Reg. 20,887, 20,889-90 (1971) (emphasis added). Relying on the Recommended Decision and the Decision, Petitioners conclude that the Secretary intended that crediting to the handler for the

handler's own advertising could only occur if the Board had its own advertising program. 37 Fed. Reg. 617 (1972). Petitioners contend that the Secretary stated that if the Board engaged in promotional work, which does not include advertising, then the Board could formulate rules to permit handlers to receive credit for their own promotional work.

Thus, Petitioners conclude that sections 981.41 and 981.441 are invalid since the Board engages in no advertising, as these sections were created to credit handlers for their own advertising. The handlers should not have to pay money to the Board until the Board engages in paid advertising. The Board cannot assess handlers for money that is not used for an advertising campaign.

Further, Petitioners argue that sections 981.41 and 981.441 are invalid because section 8c(6)(I) of the AMAA precludes the assessments when the Board has no advertising campaign. [Petitioners argue that] sections 981.41 and 981.441 are also invalid because section 10(b)(2)(ii) of the AMAA only permits handlers to pay to the Board the handler's pro rata share of expenses as the Secretary may find are reasonable and likely to be incurred by the Board. Since the Board does not advertise, it cannot be considered a Board expense assessment, and as a result cannot be collected from the handlers.

Respondent argues two procedural arguments. First, Respondent argues that this issue should not be considered because Petitioners did not raise it in the Joint Submission of Issues To Be Decided, but first raised the issue in their brief.

The goal of the administrative process is to consider all issues reasonably associated with a matter unless the other party will be prejudiced by

unfair surprise. *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979); *Jet Farms*, 88 AMA Docket No. 985-1. Respondent has not been prejudiced. Respondent replied to this argument in its brief and requested no additional time for response to this issue. Respondent had sufficient notice of the issue and was afforded an opportunity to respond. [However, the failure to raise an issue in the Petition is a jurisdictional matter. (See § VI, Additional Conclusions by the Judicial Officer).]

Second, Respondent argues that since Petitioners are arguing that section 981.441 is invalid, it must be an attack on section 981.41, which authorizes the former. Respondent explains that an 8c(15)(A) proceeding is to test the legality of a provision or the adequacy of the record supporting it, and that Petitioners are not challenging either.

Petitioners' argument is proper. They are arguing that section 981.441, which is authorized by section 981.41, is not in accordance with law. Thus, they are challenging the legality of that provision.

Respondent argues that sections 981.41 and 981.441 of the Order are clear and unambiguous. The legislative history of a statute is only consulted when there is some ambiguity in the statute at issue. Section 981.41 allows the Board, with the approval of the Secretary, to provide a handler with a credit against his assessment for "a handler's direct expenditures for marketing promotion, including paid advertising." 7 C.F.R. § 981.41(c) (1989).

Respondent argues that section 981.41 demonstrates that the Secretary did not make a distinction between promotion and paid advertising in the Order. Section 8c(6)(I) of the AMAA also demonstrates that Congress did not make such a distinction. The

AMAA provides for any form of marketing promotion, including paid advertising.

Respondent explains that the Petitioners argue that their are two assessments, one for advertising and one for promotion. There is only one assessment for promotional work including paid advertising,[10] and pursuant to section 10(b)(2)(ii) of the AMAA, the Secretary has determined that it is a reasonable expense. The Board establishes a [single] total budget, including promotional expenses, which, when approved by the Secretary, is funded by an assessment from handlers.

There is no support in the AMAA for Petitioners' argument that the advertising assessments are precluded because the Board does not have an advertising program. Neither the AMAA, nor the Secretary's Recommended Decision and Decision, makes a distinction between promotional work and paid advertising. Section 8c(6)(I) allows the Secretary to establish a project "for any form of marketing promotion including paid advertising." Section 10(b)(2)(ii) allows the Secretary to assess the handlers pro rata for the costs of the promotional program that the Secretary finds are reasonable and likely to be incurred by the Board. This is precisely what the Secretary has done in sections 981.41 and 981.441 of the Order. The assessment pays for more than the Board's promotional program, just as it would pay for more than advertising if the Board advertised. It also pays for administrative costs.

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[10] [This single assessment also pays for all other expenses of the Board, including all administrative expenses. 7 U.S.C. § 10(b)(2)(ii); 7 C.F.R. §§ 981.80, .81; RX 94, 96, 103, 106, 110, 115, 119, 126, 133, 137.]

[The one paragraph from the Secretary's Recommended Decision, quoted above, which draws a distinction between advertising and marketing promotion activities, would not be sufficient to overcome the plain words of the Act and the Order, quoted above, which refer to "marketing promotion including paid advertising" (7 U.S.C. § 608c(6)(I); 7 C.F.R. § 981.41). Furthermore, petitioners overlook the fact that in the same Recommended Decision upon which they rely, the Secretary expressly used the term marketing promotion as including paid advertising 11 times, including the vital proposed § 981.41. Specifically, the Secretary stated (36 Fed. Reg. 20,887, 20,88891 (1971) (emphasis added)):

> [(3) The notice of hearing contained a proposal to add a new paragraph (e) to § 981.40 *Procedure.* The paragraph would require that eight affirmative votes of the Control Board are necessary for adoption whenever voting on recommendations pertaining to production research, marketing research and development projects, and *marketing promotion including paid advertising* and crediting of certain eligible paid advertising expenditures of handlers. [20,288]
>
> . . .
>
> [The act also provides for authorizing for almonds, paid advertising and the authority to provide for crediting the pro rata expense assessment obligation of a handler with such portion of his direct expenditures for *marketing promotion including paid advertising* as may be authorized by the order.

[It was testified that the order should be amended to provide for such crediting and that terms and conditions applicable to crediting handlers for direct expenditures for *marketing promotion including paid advertising* should be set forth in the administrative rules and regulations. The major responsibility for applications and justification of such credit should rest with the individual handler. It should be understood that any form of crediting that is developed pursuant to administrative rules and regulations should not be applicable to production research or marketing research and development projects. The act only permits the development of a method for crediting direct expenditures for *marketing promotion including paid advertising*. Credits should be allowed for both brand and generic advertising, provided that such activities conform with the prescribed rules and regulations.

[It should be noted that under the proposed crediting system, a handler should not be permitted to qualify for excess credits. That is, the amount of credit a handler could claim should be limited to the amount of his own total assessment obligation designated for *marketing promotion, including paid advertising*. Consider the example in which the assessment obligation for a handler is $200 and $100 of this is earmarked for *marketing promotion including paid advertising*. If such handler spends $110 for creditable advertising, he should only be allowed credit up to the amount of his assessment attributable to *marketing promotion including paid advertising*, or in the example, $100. The remaining $10

should not be carried over into subsequent crop years nor should such excess amount be transferable to another handler. If a handler claims credit for less than that portion of his assessment obligation attributable to *marketing promotion including paid advertising*, the balance of such obligation should be due and payable to the Board. Such funds would become part of the Board's operating reserve. Such a reserve is discussed as material issue No. 8. [20,889]

. . .

[The amendment of the act applicable to paid advertising and crediting under the marketing order provides for crediting all or any portion of a handler's direct expenditures for *marketing promotion including paid advertising*. . . . [20,890]

. . .

[4. Section 981.41 is revised to read:

§ 981.41 Research and development.

(a) *General.* The Control Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development and *marketing promotion including paid advertising*, designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with

such portion of his direct expenditure for such *marketing promotion including paid advertising* as may be authorized. The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) or credited pursuant to paragraph (c) of this section. [20,89192]]

Petitioners argue several times that the Board has created advertising guidelines that were not approved by the Secretary. Testimony reveals that the guidelines are used by the Board only to explain the provisions to the handlers. The guidelines are not intended to be substituted for the regulations and have no legal effect. The guidelines merely track the language of section 981.441 of the Order. (PX 71; Tr. 316-17)

. . .[11]

Third, Petitioners argue that section 981.441 of the Order should have been promulgated through formal rulemaking rather than informal rulemaking.[12] While Petitioners entitle this issue in their briefs as whether section 981.441 is supported by substantial evidence in the rulemaking record, Petitioners explain that they are not challenging the informal rulemaking record of section 981.441, in and of itself, as not being supported by substantial evidence.

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[11] [The omitted material is the ALJ's discussion of his conclusion 15, which states (Initial Decision at 21):

15. Section 981.441 of the Order violates section 8c(10) of the AMAA because it regulates and restricts the advertising of almonds by handlers. 7 U.S.C. § 608c(10) (1989).

For the Judicial Officer's contrary conclusions, see Additional Conclusions by the Judicial Officer, § IV.]

[12] [This is the only issue not appealed by either side.]

Rather, Petitioners argue that section 981.441 is inconsistent with section 981.41 of the Order, which authorizes section 981.441, and as a result requires formal rulemaking.

Respondent argues that this issue should not be considered because Petitioners did not raise this issue in the Joint Submission of Issues To Be Decided, but first raised it in its brief. As explained earlier, all issues [would ordinarily] be considered as Respondent has not been prejudiced [, but this is jurisdictional (see § VI, Additional Conclusions by the Judicial Officer)].

. . . However, section 981.441 does not require promulgation through formal rulemaking. Formal rulemaking is not required unless specified by statute, and courts are reluctant to require anything more unless the complaining party has suffered a denial of due process. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

The AMAA only requires formal rulemaking for the promulgation of the marketing order. 7 U.S.C. § 608c(3) (1988). Section 981.41 was promulgated by formal rulemaking. Section 981.441 is a regulation implementing section 981.41 and thus, only requires informal rulemaking.

Petitioners offer no argument in support of their allegation except that formal rulemaking is required because section 981.41 did not authorize section 981.441. Petitioners state that when a regulation is contradictory to the Order, it requires formal rulemaking. I disagree that section 981.441 contradicts section 981.41. In fact, Petitioners in their initial brief do not argue that the sections are contradictory.

Fourth, Petitioners argue that section 981.441 of the Order, as applied, is an unlawful delegation of authority because it permits the Board to decide what will constitute creditable advertising. A handler must submit the advertisement to the Board for approval for credit toward his advertising assessment. 7 C.F.R. § 981.441(c)(6) (1989). (Tr. 237) The Board staff makes the initial decision as to whether the advertisement is creditable. (Tr. 299, 309-10) Petitioners explain that if the advertisement is approved, the handler receives credit and the process ends. This decision is not reviewed by the Secretary or AMS. If, on the other hand, the advertisement is not deemed creditable, the handler must appeal to the Public Relations and Advertising Committee. (Tr. 299, 309) Petitioners argue that this is unfair as the Committee is dominated by their competitors, the Blue Diamond members. If the Committee denies credit the handler may appeal to the Board. (Tr. 302) The Board is also dominated by Petitioners' competitors.

Petitioners allege that the process of approving the advertisements for credit was to be a ministerial function. Petitioners rely on the testimony of John Camou, who in 1971 was the Assistant to the President of Blue Diamond. Mr. Camou testified at the hearing held for the promulgation of section 981.41 of the Order that the process envisioned for the Board would simply be a clerical one, that the crediting rules would be clear so that there would be few questions, if any, relating to the crediting of advertisement. *In re Almond Growers in the State of California*, Docket No. AO-214-A4, Transcript, pp. 27, 53-55, 58, 60, March 17, 1971. Additionally, Petitioners emphasize that Roger Baccigaluppi, President of Blue Diamond, testified that, initially, the

Board should not be faced with the problem of making value judgments on the advertisements. *Id.* at 174-75. Petitioners explain that the process is not ministerial, because the Board staff are making value judgments to determine whether an advertisement is creditable. (PX 103, 106-32, 138; Tr. 240, 305) Petitioners conclude, therefore, that the Board staff are making law when they decide what advertisements should receive credit.

. . . However, I find no unlawful delegation of authority from the Secretary to the Board. Section 981.41(c) of the Order provides in relevant part:

> (c) *Creditable expenditures.* The Board, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses.

7 C.F.R. § 981.41(c) (1989). Section 981.441 of the Order states in relevant part:

> (v) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in 981.41(c). The Board shall advise the handler promptly of the extent to which such claim has been allowed.

7 C.F.R. § 981.441(c)(6)(v) (1989). Thus, the Board has been given the power to administer sections 981.41 and 981.441. The Order contains guidelines for the Board to follow in making a decision. Sections 981.41 and 981.441 specifically explain what kind of advertisements will be acceptable for credit toward the assessments.

The appeal process allows the Secretary to have the final authority on what advertisements will be acceptable as credit toward the assessments. The Secretary always has the continuing right of disapproval. 7 C.F.R. § 981.40(d) (1989). As discussed earlier, delegation by the Secretary to the Board, to administer the Order, is lawful as long as the Secretary retains the ultimate authority to make decisions.

It is significant that the Petitioners have not exhausted the appeal process to determine if their advertisements were unfairly denied. This is the only way the Petitioners can hope to bring to the Secretary's attention any abuse that might be occurring by the Board.

. . . .

VI. Annual Rules Establishing the Creditable Assessment Rate.

Petitioners argue that the annual rules from 1980-89, through which the Secretary established the creditable portion of the assessments, were not supported by a substantial basis in the rulemaking record, and from 1980-86, the Secretary did [not] comply with the notice and comment provisions of the APA. Petitioners complain that each year the Secretary merely issued the rule and failed to substantiate the need for the amount requested by the Board. There was no independent analysis of the budget recommended by the Board.

Respondent explains that the assessment rate is established by an arithmetic formula. The Board establishes a budget, estimates the size of the crop, and divides one into the other to arrive at the assessment rate. The budget is then submitted to the Secretary for approval. 7 C.F.R. §§ 981.80, .81 (1989).

The Board is comprised of producers and handlers who are qualified to evaluate the Board's needs, and estimate costs of goods, services and personnel. Respondent also notes that from 1981-88 the budget rate vote was unanimous each year and the creditable assessment rate vote was unanimous in eight of the nine years. (RX 2)

The annual rules from 1980-89 were supported by substantial evidence in the rulemaking record. (PX 40, 41, 48, 61, 62, 63, 77, 78, 79, 80, 82, 95, 98, 99; RX 44, 69, 74, 87, 94, 95, 96, 97, 98, 99, 100, 103, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 117, 119, 120, 122, 123, 124, 125, 126, 131, 132, 133, 138, 139) The Secretary in his rulemaking capacity is required to make policy decisions. Petitioners must demonstrate that those decisions were arbitrary and capricious and not supported by evidence in the record. Petitioners have not met that burden. The Secretary had before him Board meeting minutes, transcripts, and AMS field agent reports. The record for each year was ample and sufficient for the Secretary to determine whether the budgets should have been approved. Further, since the assessment rate is determined by an arithmetic formula, there is little room for discussion.

. . . .[13]

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[13] [The omitted material is the ALJ's discussion of his conclusions 19 and 20, which state (Initial Decision at 21, 22):

19. The Secretary should have allowed notice and comment pursuant to the APA on the annual rules from 1980-86, establishing the creditable assessment rate, as the rules had a substantial impact upon the handlers. 5 U.S.C. § 553 (1988). (RX 94, 96, 103, 106, 110, 115, 119)

20. The rules imposing the assessment rate from 1980-88, that were promulgated after the handling of almonds had

VIII. [Misnumbered] Assessment on Reserve Almonds.

Section 981.81 of the Order provides that a handler must pay an assessment on almonds "received by him for his own account." 7 C.F.R. § 981.81(a) (1989). Section 981.10 defines "almonds received for his own account" as follows:

> "Almonds received for his own account" means all almonds which are received by a handler (including all almonds of his own production), except those which are received by him for storage or processing for the account of any other person and with respect to which such handler performs no handling function.

7 C.F.R. § 981.10 (1989).

Petitioners argue that the assessments of almonds held in reserve pursuant to section 981.81 of the Order are not in accordance with law. Petitioners contend that there should not have been an assessment on reserve almonds, because reserve almonds are not held for the benefit of the handler. The reserve almonds are held for the benefit of the Board and the AMAA states that handlers should not be held responsible for expenses of the Board in receiving, handling, holding or disposing of almonds. Section 10(b)(2)(ii) of the AMAA provides in relevant part:

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begun for that crop year, were retroactive in effect and therefore invalid. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S.Ct. 468 (1988); *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-5 and 981-6, March 19, 1990. (RX 94, 96, 103, 106, 110, 115, 119, 125, 126, 132, 133, 136, 137)

For the Judicial Officer's contrary conclusions, see Additional Conclusions by the Judicial Officer, §§ V, VI.]

> (ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, *other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order....*

7 U.S.C. § 610(b)(2)(ii) (1988) (emphasis added).

As Respondent argues, the assessment on reserve almonds was in accordance with law. Before a handler can assign almonds to his reserve obligation, he must first receive them. It is the handler's receipt of the almonds that activates the requirement of section 981.81. A handler's almonds are produced by him [or otherwise received by him] before they become reserve almonds. Section 981.10 defines almonds held for the account of the handler to include all almonds received by him, encompassing all almonds of his own production. Therefore, the assessment was not on almonds held for the account of the Board, but was on almonds received by the handler, which may have subsequently been held for the account of the Board.

Thus, section 10(b)(2)(ii) of the AMAA is not implicated.

If section 10(b)(2)(ii) of the AMAA were implicated, the assessment would still be appropriate. The language explains that handlers must pay their pro rata share of the expenses of the Board, except expenses incurred in receiving, handling, holding or disposing of almonds by the Board for the benefit or account of persons other than handlers subject to the Order. Petitioners are handlers subject to the Order, thus they would not be exempt from paying their pro rata share of the costs of the Board.

[In addition, even if the Secretary were not permitted by the Act and Order to include reserve almonds in the assessment computation, it would not lower a handler's assessment. The Act and Order require that the assessment rate produce the amount of money needed to fund all the expenses of the Board (7 U.S.C. § 610(b)(2)(ii); 7 C.F.R. § 981.81(a)). If the Secretary were not permitted to include reserve almonds as part of the size of the crop to be divided into the budget amount, the assessment rate would be higher than under the present procedure (since a smaller number of almonds would be meeting the identical budget needs). This higher rate, applied only to the saleable portion of each handler's almonds, would have to produce the same amount of money as the lower rate (under the present procedure) applied to all of the almonds received by a handler (including almonds that later become reserve almonds).]

IX. The First Amendment.

Petitioners argue that the creditable portion of the assessment obligation of sections 981.41, 981.81 and 981.441 of the Order violate their rights of free speech

and association under the First Amendment of the United States Constitution. U.S. Const. amend. I. While Petitioners cite both cases dealing with compelled speech and association and cases dealing with content-based regulations, their argument is that their First Amendment rights are violated by compelled speech and association. As a result, this is the issue that I will review. It should be noted that the [appropriate test for government regulation which impinges on commercial free speech is set forth in *State University of New York v. Fox*, 492 U.S. 469, [109] S. Ct. 3028, 3034-35 (1989). That test requires only that the government regulation bear a reasonable "fit" to the government's important interest.[14] Specifically, the Court stated in *Fox* (109 S. Ct. at 3034-35):

> [In sum, while we have insisted that "'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful,'" *Shapero* [*v. Kentucky Bar Assn.*], 486 U.S., at [478], 108 S.Ct., at 1924 (1988), quoting *Zauderer*, 471 U.S., at 646, 105 S.Ct., at 2279, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will

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[14] [The ALJ stated (Initial Decision at 84):

It should be noted that the standard used if a regulation is found to be content-based is the same as the standard applied in this case to the compelled speech and association arguments, the compelling state interest standard. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988).]

> achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas [de Puerto Rico Assoc. v. Tourism Company of Puerto Rico]*, 478 U.S., at 341, 106 S.Ct., at 2977, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," *In re R.M.J., supra*, 455 U.S. [191], at 203, 102 S.Ct., at 937 [(1982)]; that employs not necessarily the least restrictive means but, as we have put it in other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.]

Relying on *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), Petitioners argue that their associational rights are violated because they are required to pay an advertising assessment or in the alternative, to advertise pursuant to section 981.441 of the Order and receive credit toward their assessment. In *Abood*, the Supreme Court found that state laws allowing management and unions to enter into "agency shop" agreements where every employee, as a condition of employment, paid the union a service charge equal in amount to union dues, infringed upon the employee's right to be free from compelled speech and association. A portion of the dues collected were spent for political purposes with which the plaintiffs disapproved. The Court determined that the compelled contributions paid to private groups engaging in First Amendment activities implicated the First

Amendment rights of the plaintiffs. *Id.* at 222. As long as the dues were used to finance expenditures by the union for collective-bargaining, contract-administration and grievance adjustment purposes there was no First Amendment violation, but plaintiffs could not be compelled to contribute for political activity with which they disagreed. *Id.* at 225-26, 234-35; *Accord, Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

Petitioners complain that they are ideologically opposed to the advertising program and that they are being forced to spend their own money to disseminate the views of Congress, the Almond Board, and Petitioners' major competitor, Blue Diamond.

Respondent argues that the Order does not force the Petitioners to advertise almonds. Petitioners have the choice to simply pay the assessment directly to the Board, rather than advertise and seek credit. Additionally, section 981.441 only specifies the kind of advertisement that must be done to receive credit, and does not compel the handlers to advertise only in this manner. Handlers are free to advertise anything they want, but may not receive credit for it if it does not meet the requirements of section 981.441.

Respondent explains that *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, ___ U.S. ___, [110] S. Ct. 1168 (1990), is applicable and dispenses with the issue. The Beef Promotion and Research Act at issue in *Frame* was based on the AMAA and is therefore similar. *Frame*, 885 F.2d 1119.

The court held in *Frame* that the advertising program established by the Beef Promotion and Research Act did not violate the First Amendment rights of the cattle producers. The court charac-

terized the speech at issue as commercial speech. The court explained that the beef act could only be sustained constitutionally if the government could demonstrate that the act was adopted to serve compelling state interests, that were ideologically neutral, and that could not be achieved through means significantly less restrictive of free speech and associational freedoms. *Id.* at 1134. The court applied the higher standard of review because it found that the associational rights of the cattle producer were implicated based on *Abood*. *Id.* at 1131-34. The court explained that "the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity." *Id.* at 1132. The funding scheme at issue where the cattle producer paid an assessment of $1.00 per head of cattle was similar to the required dues in *Abood*, "with its close nexus between the individual and the message funded." *Id.*

The court concluded that the government interest was of such importance to justify the slight incursion on the cattle producer's associational and free speech rights:

> That the interest advanced by the Beef Promotion Act is primarily economic does not diminish its importance. For example, the establishment of industrial harmony—although an "economic" interest—is sufficiently important to justify significant intrusions on the employees right to associate. . . . Widespread losses and severe drops in the value of inventory have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether. . . . A

> continuation of this trend would endanger not only the country's meat supply, but the entire economy. . . . The Act also furthers important non-economic interests. Maintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life. . . .

Id. at 1134-35 (citations omitted). The assessments provide for achieving both the economic and non-economic goals of the beef act. *Id.* The court compared the intrusion upon the cattle producer's rights with the intrusion found in the union shop agreement cases and determined that the intrusion here was slight in comparison:

> The Cattlemen's Board is authorized only to develop a campaign to promote the product that the defendant himself has chosen to market. Thus, the Cattlemen's Board is authorized only to engage in commercial speech on behalf of producers. Unlike the union, the Board will not engage in activities that necessarily implicate a broad range of ideological, moral, religious, economic, and political interests, such as negotiation of wage increases, medical benefits, and limitations on the right to strike.
>
> Furthermore, in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 [1984], the Court explicitly recognized that spending for non-political purposes burdens first amendment rights less significantly than does spending for other purposes.

Id. at 1136. The court also noted that "the individual cannot withdraw his support merely because he disagrees with the group's strategy." *Id.* (citing *Abood*, 431 U.S. at 223 (quoting *Street*, 367 U.S. 778)).

. . . Petitioners' First Amendment arguments question the constitutionality of the advertising program as a whole and not exclusively section 981.441. In applying the analysis used by the court in *Frame*, [if that were the proper standard of review,] I find that Petitioners first amendment rights are implicated, but that the government has a compelling state interest, that is ideologically neutral, and that cannot be achieved through less restrictive means. Both parties agree that the speech at issue is commercial speech.

The government's interest here is to promote the sale, consumption, and use of California almonds. The Order was instituted to rescue an already deteriorating almond industry:

> Almond production in California has increased sharply from an annual average of 12,380 tons during 1931-35 to an average of 33,440 tons during 1945-49. In 1949, a record crop of 39,000 tons was produced. This upward trend in production is expected to continue, since the acreage of trees which have not yet reached bearing age is more than enough to maintain present bearing acreage and is planted mainly in high yielding districts, also due to improved cultural practices, per acre yields have increased. Crops of 50,000 tons may reasonably be expected in the near future. The upward trend in production of almonds and other domestic tree nuts and the high level of tree nut imports, which compete with almonds in domestic markets, are expected to result in even more acute almond marketing problems in the future than those which now exist.
>
> . . . .

> During the past two seasons, some growers' costs of producing almonds exceeded the prices which they received. As a result, some orchards are being neglected, and in some instances, trees have been pulled out. The uncertainty as to the future has also retarded the replacement of equipment, which, in itself, tends to raise production costs. There are approximately 8,800 almond growers in California who are dependent, to varying degrees, upon the income from their almond orchards for their living and operating expenses. Unless corrective measures, including the program proposed herein, are put into effect promptly, it seems probable that the present economic situation in the almond industry will become worse.

15 Fed. Reg. 3623, 3624 (1950). Section 981.41 was [originally] added to the Order [in 1970] to "provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of almonds." 35 Fed. Reg. 7428, 7432 (1970). There is a need to stimulate the demand for almonds. The purpose of the marketing promotion [including paid] advertising program [, proposed in 1971 as an amendment to § 981.41, and promulgated in 1972,] is to enhance returns to producers. 36 Fed. Reg. 20,887, 20,889 (1971). Like the beef act in *Frame*, the Order was enacted for economic and non-economic reasons. The Order was necessary to rescue the almond industry. The costs of producing were outweighing the profits received by handlers. The Order regulates the quantity of almonds that can be marketed, in order to stabilize the industry and provide for the best return

to the handlers. The Order also ensures that the handlers will be able to stay in business and continue their livelihood. The advertising program provides a necessary end to achieving the goals of the Order, by promoting the sale, use and consumption of almonds. As in *Frame*, the intrusion here is slight compared to the union shop agreement cases, and is justified by the governmental interest of preserving the almond industry. Therefore, the Order is ideologically neutral. (Tr. 431)

X. Taxing Power of Congress.

Petitioners argue that the creditable portion of the assessment obligation amounts to a tax and is an unconstitutional exercise of the taxing power granted to Congress. U.S. Const. art. I, § 8, cl. 1. Petitioners contend that the power to collect assessments is an unlawful delegation of authority by Congress because they failed to specify any guidelines.

Respondent argues that the assessment is not a tax, but rather a lawful delegation by Congress of its commerce powers, and assuming that the assessment is a tax, the delegation is still lawful. Respondent explains that Congress' delegation of authority to the Secretary to promulgate assessment regulations was a proper exercise of authority under the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. Section 8c(1) of the AMAA provides:

> (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection

> (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. § 608c(1) (1988). This section of the AMAA reflects the intent of Congress to invoke its commerce powers.

In *Frame*, it was explained that earlier in the litigation, the defendant had argued that the assessments on beef constituted a tax, but the parties eventually agreed that in enacting the Beef Promotion and Research Act, Congress was exercising its power under the Commerce Clause. *Frame*, 885 F.2d at 1125 n. 4. The court of appeals explained that Congress' intent to delegate authority pursuant to the Commerce Clause was reflected in the [Act's finding] that " 'beef and beef products move in interstate and foreign commerce,' or 'directly burden or affect interstate commerce of beef and beef products,' 7 U.S.C. § 2901(a)." *Frame*, 885 F.2d at 1125. This language is similar to the language in section 8c(1) of the AMAA.

The district court dealt with the issue that the assessment was an unlawful delegation of Congress' taxing power. The court explained that since 1935, no statute had been found to be an unlawful delegation of legislative authority. The court found that the Beef Promotion and Research Act provided the significant terms and conditions, and left little discretion to the

Secretary. *United States v. Frame*, 658 F. Supp. 1476, 1479 (E.D. Pa. 1987).

Respondent explains that the Supreme Court reviewed an unlawful tax challenge in *Skinner*, 109 S. Ct. 1726, and found that the challenged delegation was lawful. The Court found that the Constitution places no stricter requirement on Congress in delegating its authority under the taxing power than it does in delegating its authority under the commerce power. *Id.* at 1733. The Court then applied the non-delegation standard:

> Earlier this Term, in *Mistretta*, 488 U.S. [361], we revisited the nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could "'ascertain whether the will of Congress has been obeyed,'" no delegation of legislative authority trenching on the principle of separation of powers has occurred. . . . (it is 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. . . .")

Id. at 1731 (citation omitted).

Respondent concludes that there has been no unlawful delegation of authority. The *Frame* court held that the Beef Promotion and Research Act, which is modeled after the AMAA, did not unlawfully delegate authority to the Secretary. *Frame*, 885 F.2d at 1128. The limitations placed on the Secretary are similar to those the Court highlighted in *Skinner* as why there was no unlawful delegation of authority. The Secretary may not collect assessments from any

person not regulated under a marketing order (7 U.S.C. § 608c(10) (1988)); he may not use promotional funds for anything that does not effectuate the declared policy of the Act (7 U.S.C. § 602(3) (1988)); and he must apply a uniform assessment to all handlers regulated under the Order (7 U.S.C. § 608c(10) (1988)).

For the reasons stated by Respondent, I find that there was no unlawful delegation of authority by Congress to the Secretary. Petitioners argue in their reply brief that the court in *Frame* found that the most important aspect in determining that there was no unconstitutional delegation of authority was that Congress specified the assessment in the Act at $1.00 per head of cattle. *Frame*, 885 F.2d at 1128. While the court found it important, it was not solely determinative as to whether there was an unlawful delegation of authority. In fact, the court states that under the Beef Promotion and Research Act, "Congress has delegated far less discretion than the Supreme Court has previously sanctioned in applying the non-delegation doctrine. . . ." *Id.* (citations omitted). The Judicial Officer in *Sequoia Orange*, 47 [Agric. Dec.] at 184, explained that "[l]egislative standards far less specific than those contained in the present Act [AMAA] have been held to state a sufficiently definite standard for administrative action." The AMAA does [not][15] unlawfully delegate authority to the Secretary.

. . . .

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[15] [The ALJ's ommission of "not" was an obvious typographical error.]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The ALJ's conclusions with which I disagree are discussed seriatim, followed by a discussion of petitioners' appeal, with which I disagree.

I. It Was Neither Necessary nor Desirable for the Secretary to Promulgate Regulations for the 1984- 85 and 1985-86 Crops, Specifying the Percentage of the Reserve to Be Used in the Market Development Program for Almond Butter and School Lunches.

The ALJ held that it was fatal error for the Secretary to fail to specify in the regulations for 1984-85 and 1985-86 the percentage of the reserve to be used in the Market Development Program for Almond Butter and School Lunches (Program), stating (Initial Decision at 47-49):

> Second, Petitioners argue that for the crop years 1984-85 and 1985-86, the Secretary erred by failing to specify in the final rules the percentage of the reserve to be allocated to the Program. The Secretary stated in the final rule for 1984-85:
>
> > The remaining 25 percent (123.5 million pounds) of the 1983 marketable supply must be withheld by handlers to meet their reserve obligations. The Board plans to allocate a small portion of these almonds for use chiefly in the almond butter and school lunch projects begun during the 198283 crop year.

(RX 36) In the final rule for 1985-86 the Secretary stated: "The remaining 20 percent (94 million pounds)

of the 1985 crop marketable production must be withheld by handlers to meet their reserve obligations." (RX 67)

The Secretary was in error by not specifying the percentage of the reserve allocated for the Program for the marketing years 1984-85 and 1985-86. For these years, the Secretary merely stated the total percentage of the reserve without a discussion of how the reserve was to be allocated. The reserve was a substantial increase from the prior years. The Secretary should have included the specific allocation of the reserve in the proposed rule to allow notice and comment on the intended use of the reserve. The Secretary, also, should have included the breakdown in the final rule. Certainly, the allocation of reserve had a substantial impact upon the rights and interests of the handlers and should have been promulgated through APA rulemaking. As a result of the Secretary's failure to follow the APA, the regulations are invalid. *Buschmann v. Schweiker*, 676 F.2d 352, 355-56 (9th Cir. 1982).

Petitioners argue in their reply brief that the Board was making law. As explained, Petitioners argue that for the crop years 1984-86, the Secretary did not specify the amount of the reserve to be used for the Program.

Respondent argues that the Secretary made no decision as to the amount of almonds held in reserve that would be used for almond butter. Respondent explains that the Order establishes the permissible uses of reserve almonds in section 981.66(c):

> (c) *Exclusion from salable normal trade channels.* No reserve almonds shall be sold in the United States, Puerto Rico, and the Canal Zone

> other than to governmental agencies or to charitable institutions for charitable purposes, except for diversion into almond oil, almond butter, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds, and with proper safeguards in each case to prevent such almonds thereafter entering the channels of trade in such normal markets.

7 C.F.R. § 981.66(c) (1989).

Petitioners claim that if it is true that the Secretary did not determine the amount of reserve to be allocated to the program, then the Board did, and, as a result, the Board was making law.

The Board was not making law. There was no unlawful delegation of authority to the Board. While the Secretary was in error for not specifying in the rule the allocation of the reserve to the Program, the Board was not operating without any supervision.

Respondent explains that the Secretary did not specify the breakdown of the reserve, but ends his argument here. All section 981.66(c) provides for is the exclusion of reserve almonds from normal trade channels and does not speak to the reserve percentage. In a later argument in its brief, Respondent states that the Secretary established the reserve requirement to be used for the Program, and that each handler must withhold that percentage. Then Respondent explains that a handler was required to turn over that percentage of almonds to the Board, or a handler could have signed an agency agreement and disposed of the required percentage into almond butter or other non- competitive outlets for the Board. 7 C.F.R. § 981.67 (1989). (PX 38; RX 34, 65, 85)

Yet, Respondent never explains where the Secretary established the reserve percentage to be allocated to the Program.

It appears from the evidence that the Secretary approved of the amount of the reserve to be allocated to the Program by approving the salable and reserve percentages. (Tr. 459-61) Thus, the Board was not establishing the amount of the reserve percentage to be allocated to the Program. The Board would recommend the percentage to the Secretary and await approval. While, it appears that the Secretary was aware of the percentage of the reserve being allocated to the Program, as outlined above, the Secretary should have specified the allocation of the reserve for the Program in the final rule for the marketing years 1984-85 and 1985-86.

The ALJ's decision as to this issue overlooks the fact that the reserves were established for the 1984-85 and 1985-86 crops for the purpose of supply management, in view of the huge surplus expected during each of those years. As shown in note 7, *supra*, the estimated surpluses for the 1982-83 and the 1983-84 crops were two percent and three percent, respectively. However, for the 1984-85 and 1985-86 crops, the estimated surpluses were 25 percent and 20 percent, respectively, requiring the establishment of the reserves irrespective of any considerations as to the Program for almond butter and school lunches. Specifically, the statistics set forth in the Secretary's final rules for the 1984-85 and 1985-86 crops are as follows (RX 36, 67):

fact that the reserves were established for the 1984-85 and 1985-86 crops for the purpose of supply management, in view of the huge surplus expected during each of those years. As shown in note 7,

supra, the estimated surpluses for the 1982-83 and the 1983-84 crops were two percent and three percent, respectively. However, for the 1984-85 and 1985-86 crops, the estimated surpluses were 25 percent and 20 percent, respectively, requiring the establishment of the reserves irrespective of any considerations as to the Program for almond butter and school lunches. Specifically, the statistics set forth in the Secretary's final rules for the 1984-85 and 1985-86 crops are as follows (RX 36, 67):

	1984-85 Crop Million Pounds	1985-86 Crop Million Pounds
Carryover from Prior Year Est. Production	91.8	228
	494.0	470
Total Supply	585.8	698
Est. Demand	380.0	400
Est. Year-end Carryover	82.3	204
Demand + Year-end Carryover	462.3	604
Est. Surplus	123.5 (25% of Est. Prod.)	94 (20% of Est. Prod.)

Hence, considering the total estimated supply and demand situations, there was an estimated 25% surplus for the 1984-85 crop (123.5 ÷ triangle÷ 494 = .25) and an estimated 20% surplus for the 1985-86 crop (94 ÷ triangle ÷ 470 = .20) [16]

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[16] The same result is reached if we follow the formula set forth in the Order, which directs the Secretary to "give consideration to the ratio of estimated trade demand (either domestic or domestic plus export, less the handler carryover available to satisfy trade demand plus the desirable handler carryover at the end of the crop year) to the estimated production of marketable almonds" (7 C.F.R. § 981.47). For example, for the 1984-85 crop, if we take the "estimated trade demand" (380), less the "handler carryover available to satisfy trade demand" (91.8), plus the "desirable handler carryover at the end of the crop year" (82.3), we have a figure of 370.5 (380 -91.8 + 82.3 = 370.5). The ratio of that figure (370.5) to the "estimated production of marketable almonds (494) is .75 (370.5 ÷ triangle ÷ 494 = .75), or 75%. So the saleable percentage would be 75% and the reserve percentage would be 25%, which

The Secretary's original final rule for the 1984-85 crop, published after a notice-and-comment period had been published in the Federal Register, explained the necessity for the 25% reserve, as follows (RX 36, 49 Fed. Reg. 38, 530 (1984)):

> **SUMMARY:** This final rule establishes salable, reserve, and export percentages of 75 percent, 25 percent, and 0 percent, respectively, for marketable California almonds delivered to handlers during the 1984-85 crop year, which began July 1, 1984. This action is taken under the marketing order for almonds grown in California and is designed to promote orderly marketing conditions in view of an estimated record large 1984 almond crop.
>
> . . . .
>
> The remaining 25 percent (123.5 million pounds) of the 1983 marketable supply must be withheld by handlers to meet their reserve obligations. The Board plans to allocate a small portion of these almonds for use chiefly in the almond butter and school lunch projects begun during the 1982-83 crop year. These long-term projects are a means for the industry to develop new markets for almonds in view of larger crops. Allocated reserve almonds also could be disposed of in other noncompetitive outlets as specified in the order or approved by the Board.
>
> . . . .

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is the same result arrived at by my calculations set forth immediately above.

> The order permits the Board to include normal export requirements with domestic requirements in its estimate of trade demand when recommending the establishment of salable, reserve, and export percentages for any crop year. For the 1984-85 crop year, estimated exports are included in trade demand, thereby making export a salable outlet rather than a reserve outlet. Because of this action, no portion of the reserve will be eligible for export to normal outlets. Thus, an export percentage of 0 is established.
>
> . . . .
>
> The objective of the order's volume regulation provisions is to establish and maintain orderly marketing conditions for all California almonds. This action will help to stabilize supplies and prices as the industry faces its largest crop in history—a crop estimated to be 27.8 percent greater than the 1981 record crop of 407 million pounds and 114.9 percent greater than the small 1983 crop of 242 million pounds.

Similarly, the Secretary's original final rule for the 1985-86 crop, published after a notice-and-comment period had been published in the Federal Register, explained the necessity for the 20% reserve, as follows (RX 67, 50 Fed. Reg. 35, 768 (1985)):

> **SUMMARY:** This final rule establishes salable, reserve, and export percentages of 80 percent, 20 percent, and 0 percent, respectively, for marketable California almonds delivered to handlers during the 1985-86 crop year, which began July 1, 1985. This action is taken under the marketing order for almonds grown in California and is

designed to promote orderly marketing conditions in view of a projected record large almond supply for the 1985-86 crop year.

. . . .

The remaining 20 percent (94 million pounds) of the 1985 crop marketable production must be withheld by handlers to meet their reserve obligations. Authorized outlets for reserve almonds include new uses and markets for almonds such as almond butter, the school lunch program, an almond paste made from unblanched almonds, sales of almond snack packs to airlines and hotels at reduced prices with the agreement that these organizations would give away the snack packs to their customers on a complimentary basis, an [sic] various fund raising promotions. Such market development is necessary in view of the current supply situation and anticipated large crops in future years. Reserve almonds also could be disposed of in other noncompetitive outlets as specified in § 981.66(c) of the order or as approved by the Board.

. . . .

The objective of the order's volume regulation provisions is to establish and maintain orderly marketing conditions for all California almonds. This action will help to stabilize supplies and prices as the industry faces its second largest crop in history on the heels of last year's record large crop of 587 million pounds. This year's total marketable supply (1985 crop marketable production plus salable carry in from the 1984 crop is

> projected at a record 698 million pounds—6.6 percent above last year's previous record of 654.5 million pounds. World production also is expected to set a record, and sales of California almonds in export are expected to be difficult due to unfavorable exchange rates and large projected crops in Spain and Italy. Thus, California faces strong competition for export markets.

Accordingly, the identical reserves would have been established for the 1984-85 and 1985-86 crops, irrespective of any considerations relating to the Program for almond butter and school lunches. It was neither necessary nor desirable for the Secretary to specify, by regulation, either a maximum or minimum number of almonds to be available for the Program.

In this respect, it is significant that the Order specifies the only allowable uses for reserve almonds, one of which is for almond butter. The Order states (7 C.F.R. § 981.66) (emphasis added):

> **§ 981.66 Conditions governing disposition of reserve.**
>
> (a) *General.* The *Board shall have power and authority to sell or dispose of any and all reserve almonds withheld* upon the best terms and at the highest return obtainable consistent with the ultimate complete disposition of reserve, subject to all conditions of this section.
>
> . . . .
>
> (c) *Exclusion from salable normal trade channels.* No reserve almonds shall be sold in the United States, Puerto Rico, and the Canal Zone *other than to governmental agencies* or to

> charitable institutions for charitable purposes, *except for diversion into* almond oil, *almond butter*, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds, and with proper safeguards in each case to prevent such almonds thereafter entering the channels of trade in such normal markets.

Hence, in view of the provisions of the Order and the supply-demand conditions for the 1984-85 and 1985-86 crops, it was not *necessary* to establish a specific reserve for almond butter, or to specify the amount of the much larger reserve (created for supply- management purposes) that was expected to be used for almond butter. Furthermore, in view of the newness of this Program, it was not even *desirable* to specify by regulation, in 1984 or 1985, an almond-butter reserve, either by way of a minimum or a maximum percentage.

Assuming that the Secretary erred by failing to establish by regulation the amount of the reserve to be used for almond butter (which is not the case), no monetary damages could be awarded to petitioners. As stated in *In re Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705, slip op. at 69-75 (July 9, 1990), *appeal docketed*, No. CV F 90-473-EDP (E.D. Cal. July 27, 1990) (reproduced herein without the customary, further indentation):

EXCERPT FROM WILEMAN I

C. The Act Does Not Authorize the Award of Monetary Damages.

Under the plain terms of the Act, a handler's petition under § 8c(15)(A) of the Act is limited to

"stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law *and praying for a modification thereof or to be exempted therefrom*," and the Secretary is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A) (emphasis added)). There is no authorization in the Act, the Marketing Orders, or the Rules of Practice for consequential damages (as distinguished from a return of monies paid) to be awarded in § 8c(15)(A) proceedings. In over 50 years of proceedings under this Act, consequential damages have never been awarded. Petitioners and the ALJ attempt to distinguish fruit and vegetable orders from milk orders by contending that the latter orders only involve monies paid, and never consequential injury. This allegation is incorrect. For example, a milk supply plant might well suffer only consequential damages from a pooling provision that required an unlawfully high percentage of its milk to be delivered to distributing plants. Nonetheless, no case has ever been decided under milk orders or fruit and vegetable orders which would allow for consequential damages.

There have, of course, been some milk cases in which, as a result of a determination that an obligation to pay money imposed on a milk handler by a Market Administrator was unlawful, refunds have been made to the handler. See, e.g., *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 59 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988). But even "where a handler has been awarded money in a § 8c(15)(A) proceeding, interest [i.e., consequential damage] has never been awarded." *Id.* at 60.

Furthermore, even though an obligation unlawfully imposed on a milk handler might permit a return of the money unlawfully exacted from the handler, the general practice in this Department is first to give the Secretary the opportunity, in his rulemaking capacity, to correct the error, retroactively. As stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, slip op. at 71-73 (Apr. 12, 1990), *appeal docketed*, CIV-90-688 T (W.D. Okla. May 1, 1990):

> Since I am dismissing the petition, it is unnecessary for me to rule on what relief would have been appropriate if the petition were not dismissed. However, if the petition were not dismissed, I would have remanded the proceeding for the Secretary to determine the appropriate remedy in his legislative capacity, for the reasons set forth in Respondent's Appeal Petition at 36-69, attached as Appendix B, and Respondent's Reply Brief filed Oct. 11, 1988, at 5-7, attached as Appendix C. (These excerpts from respondent's briefs will not be published in Agriculture Decisions, since it is not necessary for me to decide this issue.)

As stated in *In re Baker & Sons, Dairy, Inc.*, 48 Agric. Dec. 818, slip op. at 66-67 (Sept. 22, 1989), *appeal docketed sub nom. Meadow Gold Dairies, Inc. v. Yeutter*, No. 89-543-JJF (D. Del. Oct. 10, 1989):

> VI. <u>If the Secretary's Temporary, Emergency Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.</u>

If the Secretary's temporary, emergency rulemaking action were held to be unlawful, the proper

course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioners. See *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 57-62 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988);[8] *In re Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), *remanded*, 38 Agric. Dec. 1061 (1979),[9] *dismissed per settlement agreement*, 40 Agric. Dec. 1711 (1979); *In re Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

In some cases, courts have remanded proceedings for further administrative consideration. See, *e.g.*, *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619-23 (1944) (remand is the proper course where

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[8] In *Defiance*, the Judicial Officer recognized that some courts had awarded monetary relief to some handlers, but the Judicial Officer did not adopt that policy as the proper Departmental policy.

[9] In *In re Borden, Inc.*, 38 Agric. Dec. 1061 (1979) (remand order), the Judicial Officer remanded the proceeding to the ALJ to determine the damages [i.e., the return of money paid by the handler]. But that remand order does not reflect the Department's customary practice, since the remand order related to two related proceedings, one of which was controlled by a court decision holding that Borden was entitled to recover overpayments from the producer-settlement fund. *Borden, Inc. v. Butz*, 544 F.2d 312, 319-20 (7th Cir. 1976).

part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland*, *supra*; *Rodway v. USDA*, 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, *e.g.*, *Blair v. Freeman*, 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); *accord United States v. Morgan*, 307 U.S. 183, 185-98 (1939).

In *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 57-59 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988), referred to in the preceding quotation, it is stated:

> III. If the Secretary's Temporary Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.

After concluding that it was unlawful for the Secretary to refuse to adopt petitioner's proposal, the ALJ ruled (Initial Decision at 28):

> The result of the Secretary's action was that petitioner was required to pay 40 cents per hundredweight more for producer milk than its competitors marketing other Class III products. The proper remedy in such circumstances is for the Market Administrator of Order 33 to reimburse petitioner the amount of this

In the first place, petitioner was not required to pay more for milk than its competitors making evaporated milk or any of the other 14 products remaining in Class III. Only handlers making butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) benefited from the temporary price reduction. All handlers of the 15 products remaining in Class III, including other handlers making evaporated milk, continued to pay the same basic formula price previously set by a valid rulemaking proceeding.

But even if the Secretary's rulemaking action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioner.

If, for example, the Secretary's temporary rulemaking action were held unlawful because the Secretary failed to explain in his rulemaking decision that he was actually reclassifying milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in a new Class III(A), priced 40¢ less than the basic formula price applicable to Class III, the obvious remedy would be for the Secretary to amend his findings and conclusions, which would eliminate the illegality.

If, on the other hand, it were held (i) that substantial evidence does not support putting butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A), or (ii) that it is unlawful to include butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A) without also including evaporated milk, the Secretary might (a) want to hold a new hearing to determine *nunc pro tunc* what temporary action should have been taken (which could take anyone of numerous forms), (b) acquiesce in the determination of illegality and annul the temporary rulemaking action as to all handlers, or (c) include evaporated milk (and perhaps other products) in the temporary, new Class III(A). There would be no basis for binding the Secretary to take only one action, *viz.*, include evaporated milk, but none of the other 14 products that would remain in Class III, in the new Class III(A).

Where it has been administratively determined that the Secretary's rulemaking action is unlawful, it has been the practice in this Department for more than 40 years to remand the proceeding to the Secretary, rather than for the ALJs or the Judicial Officer to take corrective rulemaking action. See, *e.g.*, *In re Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), *remanded*, 38 Agric. Dec. 1061 (1979), *dismissed per settlement agreement*, 40 Agric. Dec. 1711 (1979); *In re The Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's

discretion, while granting petitioner prospective relief in the interim).

Even during the period prior to 1980, when the delegation of authority to the Judicial Officer included authority to perform "any regulatory function" (7 C.F.R. § 2.35 (1979)), which is not now in the Judicial Officer's delegation of authority (7 C.F.R. § 2.35 (1984)), in actual practice, the Judicial Officer always refrained from exercising any rulemaking function. Flavin, "The Functions of the Judicial Officer, USDA," in 26 Geo. Wash. L. Rev. 277, 278 n. 9 (1958) (written by the Department's Judicial Officer from 1942 to 1972).

In similar situations, courts also frequently remand proceedings for further administrative consideration. See, *e.g.*, *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland*, *supra*; *Rodway v. USDA*, 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, *e.g.*, *Blair v. Freeman*, 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secre-

tary could retrospectively apply new regulation to impounded funds); *accord United States v. Morgan*, 307 U.S. 183, 185-98 (1939).

Courts have, however, awarded relief to prevailing parties in some cases distinguishable from the present case. In *Fairmont Foods Co. v. Hardin*, 442 F.2d 762 (D.C. Cir. 1971), a handler challenged the 1965 promulgation of a higher Class I price applicable to its plant location and requested a refund of the difference between the pre-1965 price and the higher price it had been forced to pay between 1965 and 1968 as a result of the amendment. *Id.* at 766 n. 16. The court set aside the amendment because the rule-making record did not contain substantial evidence to support it. *Id.* at 767. The court concluded that the plaintiff was entitled to recover the "overpayments which it made pursuant to this invalid Order." *Id.* at 773.

In *Fairmont Foods*, the court held that the handler should only have paid the price set by the valid Order provision which preceded the invalid amendment, and that the "overpayments" should be returned to the handler. In the present case, however, the price petitioner paid for milk in June and July 1983 was the same price it had been paying which had been set by a valid Order provision not even challenged in this proceeding. There is no prior, valid price to revert to, as in *Fairmont Foods*, because the prior, valid price is the one which petitioner paid in this case.

Similarly, in *Borden, Inc. v. Butz*, 544 F.2d 312, 319-20 (7th Cir. 1976), and *Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz*, 584 F.2d 12, 16-21 (3d Cir. 1978), handlers challenged order amendments which raised the Class I price for their milk above the level at which it had been previously set. The courts

found insufficient evidence for the amendments, and, therefore, held that they were invalid. The handlers' recoveries were based on the fact that they had paid a price set by invalid Order provisions. But, as stated above, here petitioner's price for milk was set by a prior, valid Order provision. Accordingly, those cases are not analogous to the situation here.

In the present case, if the Secretary's temporary, rulemaking action were held unlawful, I would adhere to the Department's settled practice for over 40 years, and remand the proceeding to the Secretary for further legislative consideration. That action is particularly appropriate here in view of the numerous, reasonable options available to the Secretary, if his original, temporary action were held invalid.

Similarly, in *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 191 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), it is stated:

> Finally, even if petitioners had properly made a case as to the omission of alternative views (which they did not), and I believed such an omission to be legal error (which I do not), rather than hold invalid those weekly volume regulations where petitioners proved their case, in this respect, I would have remanded the matter to the Division Director to make a determination at the present time as to whether the additional information would have altered the regulation for the week in question. *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619-23 (1944); *In re Oak Tree Farm Dairy, Inc.*, 38 Agric. Dec. 113, 165-66 (1979) (decision on remand), *aff'd*, 544 F. Supp. 1351 (E.D.N.Y. 1982).

However, irrespective of whether the Secretary should be permitted to correct an error retroactively, where error has been found in a § 8c(15)(A) proceeding, an award of monetary damages (as distinguished from a return of money already paid) is not permitted by the Act.

END OF EXCERPT FROM WILEMAN I

II. The Secretary Was Not Required to Promulgate Through APA Rulemaking the Board's Minimum Prices and Special Assessments for Reserve Almonds Disposed of for Almond Butter and School Lunches.

The ALJ held that the Secretary erred by failing to promulgate through APA rulemaking the Board's minimum prices and special assessments for reserve almonds disposed of under the Program for almond butter and school lunches, stating (Initial Decision at 49-53):

> Third, Petitioners argue that the Secretary should have invoked the APA and allowed notice and comment on the determination of the minimum prices and special assessments on almonds disposed of under the Program. While Petitioners label their argument as whether the Board exceeded its authority by establishing the minimum prices and special assessments, the focus of their argument is that the Secretary should have followed the APA in establishing the minimum prices and special assessments.

Petitioners explain that the Board determined the minimum prices and special assessments for almonds sold into almond butter or other non-competitive outlets. These minimum prices and special assess-

ments were made part of the agency agreement, signed by handler, to act as agent for the Board in disposing of his reserve almonds. These minimum prices and special assessments were not promulgated through rulemaking. (Tr. 329) Minimum prices were established for almonds sold into almond butter. An advertising assessment was also established that must have been paid in addition to the minimum price for almonds sold into almond butter. (PX 36, 41, 43, 58; RX 5, 6, 21, 34, 64, 65, 84, 85, 86) The advertising assessment applied to almonds sold for feed, as well. (Tr. 92)

Respondent asserts that rulemaking was not required for the special assessments and the minimum prices because a handler accepted the assessments and prices on a voluntary basis by signing the agency agreement. (Tr. 440-41) Respondent describes the agreement as voluntary because a handler always had the choice to turn his almonds over to the Board. If a handler signed an agency agreement, he disposed of the almonds and certified to the Board that the almonds were sold into an acceptable outlet. If a handler turned his almonds over to the Board, the Board would sell them into an acceptable outlet and give the proceeds, less any expenses to the handler. If more than one handler turned reserve almonds over to the Board, the Board would pay each handler his pro rata share of the proceeds. 7 C.F.R. § 981. 66 (1989).

Respondent explains that the terms of the agency agreement were sent to the Secretary. If the Secretary had any changes, AMS would call or write with the changes; otherwise, the absence of a call or letter constituted approval of the agency agreement, as all actions of the Board are subject to the continu-

ing right of the Secretary to disapprove. 7 C.F.R. § 981.40(d) (1989). (Tr. 442, 467-69)

The minimum prices and special assessments were determinations that affected the handlers' disposition of their reserve almonds. They were substantive in nature and should have been promulgated as a rule pursuant to the APA.

Petitioner Saulsbury did not have the proper manufacturing equipment to make almond butter. It would have cost approximately $100,000 to buy the necessary equipment, and that figure does not include packaging equipment. (Tr. 86-87) When the Program was first established, Saulsbury attempted to find an outlet for almond butter but was unable to find anyone willing to purchase the almonds at the minimum price set by the Board. Later, Saulsbury sold some almonds for export and maybe a small amount domestically for use in almond butter. (Tr. 87-89) Since Saulsbury was unable to sell its reserve almonds for almond butter, they were sold for cattle feed, for two to four cents a pound. (Tr. 91-92) Almonds were selling on the world market at the time for a $1.00 to $1.10 a pound. (Tr. 92) Saulsbury was charged an advertising assessment on the almonds sold into cattle feed. (Tr. 92) Saulsbury estimated that throughout the Program it and its growers lost approximately $2.5 million, $600,000 to $700,000 of which would have been profit for Saulsbury. (Tr. 103-04)

Petitioner Cal-Almond, Inc., also attempted to find almond butter outlets when the Program was created. (Tr. 157) For the first three years of the Program, all of Cal-Almond's almonds went into feed lots, because it could not find any market for almond butter. (Tr. 163) In the last year of the Program, working with brokers, Cal-Almond discovered that Blue Diamond

was selling their almonds for almond butter and started selling its almonds to the same buyer. However, the buyer would not buy Cal-Almond's almonds at the minimum price as set by the Board, so Cal-Almond reimbursed the buyer four or five cents a pound as a purported commission to sell the almonds. (Tr. 165-66)

The Secretary is required to promulgate substantive rules pursuant to the APA. 5 U.S.C. § 553 (1988). The handlers were entitled to an opportunity to participate in the rulemaking process. These prices and assessments were imposed on the handlers and they were required to abide by them.

While Respondent argues that the minimum prices and special assessments were not rules because the acceptance of which by handlers was voluntary, Respondent admits, as a practical matter, that handlers almost never turned their almonds over to the Board, but retained control of them. The reason for this was that the Secretary could have subsequently released all or part of the reserve back into salable almonds, thus permitting the handler to sell the almonds for any use. Accordingly, the choice to enter into the agency agreement was not purely voluntary. The handler had two choices: (1) turn over all of his reserve almonds to the Board and lose control over the entire reserve, even the portion that the Secretary could later release as salable; or (2) sign the agency agreement and retain control over the reserve almonds. This was hardly a choice. Whether or not to enter into the agency agreement was not a voluntary decision as it was the only sound business decision the handler could make. (Tr. 160)

In their reply brief, Petitioners argue that the process by which the Secretary would call the Board,

by way of AMS, if there were any questions or changes and the absence of a call constituted approval, does not equal approval. Petitioners cite to this Administrative Law Judge's decision in *In re Jet Farms, Inc.*, 88 AMA Docket No. 985-1, February 2, 1990, in which I held that the regulation requiring approval by the Secretary required something more than silence, that it required an affirmative response from the Secretary. While the facts here are somewhat similar to those present in *Jet Farms*, they differ in that here there was an established practice by which the Secretary communicated approval. The Secretary would, through AMS, call or write to make any changes or ask any questions. The absence of a call or a letter indicated to the Board that the agreement had been approved. In fact, the Secretary called on several occasions with changes. (Tr. 442-43, 467-69) This was understood by all to be the procedure for approval of the agreements. In *Jet Farms* there was no such practice established.

The fact that the Secretary approved of the minimum prices and special assessments established that the Board was not acting beyond its delegated authority. However, the handlers were entitled to notice and the right to participate as guaranteed by the APA.

As a prelude to a discussion of my views with respect to this issue, it should be noted that the Order provides for restoring almonds (to the extent possible) to a handler who has turned his reserve almonds over to the Board if there is a later increase in the saleable percentage. The Order provides (7 C.F.R. § 981.59(b)):

§ 981.59 Adjustment upon increase of salable percentage.

. . . .

(b) In the case of handlers who have not been authorized to dispose of their own reserves, and handlers who have terminated their agencies to dispose of their own reserves, prior to an increase in the salable percentage, insofar as practicable each such handler shall be permitted to select almonds from his own reserve to be restored to his salable quantity. In the event there are not sufficient reserve almonds held by the Board at the time the salable percentage is increased, to make full restoration, as represented by the increase in the salable percentage, to all such handlers, the restoration to the salable quantities of the respective handlers shall be pro rata on the basis of certified kernel weight poundage of reserve contributed by said handlers during the crop year to the date of increase of the salable percentage: *Provided*, That restoration shall be made in a manner that will result, to the extent practicable, in a comparable percentage of reserve disposition for each such handler and that no handler shall receive almonds in excess of his contribution. Such restoration to the salable quantity shall be deemed to fulfill the obligation of the Board with respect to the increase in the salable percentage.

Nonetheless, since almost all handlers sign agency agreements, and dispose of their own almonds as agents of the Board, undoubtedly there is an economic incentive for handlers to sign agency agreements.

That economic incentive (or even coercion) does not mean, however, that the Secretary was required to publish the Board's minimum prices and assessments through the rulemaking process. To consider this matter in the context of the specific agency agreements involved, the agency agreement entered into between the Board and handlers for the 1982-83 crop, which is typical of the others (RX 34, 65, 85), provides as follows (PX 38):

AGENCY AGREEMENT—DISPOSITION OF RESERVE TO NONCOMPETITIVE OUTLETS

THIS AGREEMENT, made this _____ day of _____, 19__, between the Almond Board of California, hereinafter referred to as "Board," and _____, a handler of almonds, hereinafter referred to as "Agent," WITNESSETH that:

WHEREAS, Section 981.66 of the Order of the Secretary of Agriculture regulating the handling of almonds grown in California, hereinafter referred to as the "Order," authorizes the Board to dispose of reserve almonds in noncompetitive outlets; and

WHEREAS, Section 981.67 of the Order permits handlers of almonds to become agents of the Board in such disposal; and

WHEREAS, Agent as a handler of almonds is subject to the provisions of the Order and has requested authority to act as agent of the Board in the disposition of reserve almonds; and

WHEREAS, timely information on Agent's intentions to dispose and dispositions of almonds into noncompetitive outlets is necessary for effective administration of the reserve and for marketing policy determinations of the Board;

NOW, THEREFORE IT IS AGREED BY AND BETWEEN the parties as follows:

1. *General.* (a) Subject to the provisions of Section 981.66 of the Order and the regulations applicable to the crop year, Agent is hereby authorized on behalf of the Board to dispose of reserve almonds held or acquired by agent and which are subject to the Board's disposal authority. Such disposition shall conform with such inspection, certification, and other disposition terms and conditions as the Board may herein prescribe or from time to time specify, and shall be subject to the limitations placed on the Board's disposal authority for the crop year.

. . . .

5. Agent, by signing this agreement certifies that:

(a) When almonds are to be used for almond butter,[17] he will comply with the minimum prices of almonds as established by the Board . . . .

The minimum price schedule (established by the Board and approved by the Secretary) for the 1982-83 reserve program, which is typical of the others (PX 43, 58; RX 65, 84),[18] was as follows (RX 21):

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[17] The agency agreements for 1984-85 and 1985-86 also referred to school lunches (RX 65, 85).

[18] The 1984-85 and 1985-86 minimum prices were higher, and minimum prices were set for the school lunch program (RX 65, 84; PX 58).

MINIMUM PRICE SCHEDULE
1982-83 Reserve Program

1. Minimum Prices

a. Almond Butter

Minimum prices for reserve almonds sold for diversion to almond butter. Prices are per pound, FOB handler's plant—25 pound containers or larger:

U.S. Select Sheller Run (or better)	
Unblanched	50 cents
Blanched	00 cents
U.S. Standard Sheller Run	
Unblanched	49 cents
Blanched	69 cents
U.S. Number 1 Whole and Broken and U.S. No. 1 Pieces	
Unblanched	48 cents
Blanched	68 cents

Note: An advertising assessment of 10 cents per pound must be added to the above prices. The 10 cents per pound additional cost is charged "to generate advertising and general promotional funds for the butter program". The 10 cents per pound is refundable to manufacturers who buy reserve almonds to make butter and who comply with the advertising and promotion provisions of the butter program. Such refunds in turn are creditable by the Board to the handler's almond butter advertising assessment obligation. (Reference Addendum 2 to Minimum Price Schedule.)

b. USDA School Lunch

Minimum prices for reserve almonds sold for diversion to USDA school lunch. Prices are per pound, FOB handler's plant:

Whole natural	70 cents
Roasted, unsalted	95 cents
Roast:	Oil or dry
Varieties:	Nonpareil, California, NePlus
Grade:	U.S. No. 1
Size:	30 or larger
Packaging:	25 lb carton for whole natural25 lb. carton vacuum sealed packs for roasted

Turning now to the relevant provisions of the Order, the Order requires handlers to comply with reserve obligations. The Order states (7 C.F.R. § 981.46):

§ 981.46 Withholding reserve.

When a reserve percentage has been fixed for any crop year, as hereinafter provided, no handler shall handle almonds except on condition that he comply with the requirements in respect to withholding reserve almonds and the prescribed disposition thereof.

A handler may meet his reserve obligation by signing an agency agreement with the Board, i.e., by becoming an agent of the Board, and disposing of his almonds in accordance with the Board's requirements, *or* by delivering his almonds to the Board. The Order provides (7 C.F.R. §§ 981.51, .52):

§ 981.51 Requirements for reserve.

Each handler may satisfy his reserve obligation with such almonds specified in the terms of the agency agreement authorized in § 981.67, including all applicable inspection and certification requirements. Any handler who does not become an agent may receive credit by similarly delivering almonds to the Board or its designees. These requirements may be established by the Board, with the approval of the Secretary, and from time to time so modified, and may include grade requirements for reserve almonds delivered to human consumption outlets.

§ 981.52 Holding requirement and delivery.

Each handler shall, at all times, hold in his possession or under his control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation less: (a) Any quantity which was disposed of by him pursuant to § 981.67 [i.e., by becoming an agent of the Board]; and (b) any quantity for which he is otherwise relieved by the Board of responsibility to so hold almonds. Upon demand of the Board reserve almonds shall be delivered to the Board f.o.b. handler's warehouse or point of storage, except that the Board shall not make such demand upon a handler with respect to reserve almonds for which he has agreed to undertake disposition pursuant to § 981.67. Any handler who does not act as agent for the Board in the disposition of reserve almonds shall be subject to the applicable inspection and certification requirements prescribed by the Board pursuant to § 981.67.

Of overriding importance is the fact that the Order gives the Board complete power and authority to dispose of *all* reserve almonds. The Order states (7 C.F.R. § 981.66(a)):

> **§ 981.66 Conditions governing disposition of reserve.**
>
> (a) *General.* The Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable consistent with the ultimate complete disposition of reserve, subject to all conditions of this section.

Section 981.66 of the Order contains a number of other subsections, one of which, subsection (c), specifies the uses to which reserve almonds can be put, including diversion into almond butter (7 C.F.R. § 981.66(c)), quoted in § I of the Judicial Officer's additional conclusions.

Section 981.66 also sets forth subsections relating to expenses and distribution of reserve proceeds, as follows (7 C.F.R. § 981.66(f), (g)):

> (f) *Expenses.* Direct expenses incurred by the Board in the maintenance and disposition of reserve almonds shall be charged against the proceeds of sales of such almonds.
>
> (g) *Distribution of proceeds.* Net proceeds from the disposition of reserve almonds by the Board shall be distributed to each handler in proportion to his relative share of such disposition in terms of creditable reserve kernel weight pursuant to § 981.51 or such other basis as the Board may adopt with the approval of the Secretary.

In lieu of turning over reserve almonds to the Board, so that the Board may dispose of them, a handler may become an agent of the Board, for the purpose of disposing of the reserve almonds, by signing an agency agreement. The Order provides (7 C.F.R. § 981.67) (emphasis added):

§ 981.67 Disposition by handler.

Upon request of a handler, made prior to the delivery by him of any reserve to the Board in any crop year, *the Board shall authorize such handler to act as agent of the Board, upon such reasonable terms and conditions*, including inspection and certification requirements, *as the Board may specify* and subject to the conditions of § 981.66 in disposing of the reserve withheld from handling by such handler for that crop year. Any handler who is authorized to dispose of his reserve may, through arrangement with another handler dispose of such reserve through such other handler, or in lieu of disposition, may acquire credits for reserve disposition from another handler. In the first instance, the second handler shall also be subject to the conditions of 981.66. It shall be the obligation of any handler authorized to dispose of such reserve to effect disposition thereof in accordance with all applicable requirements and conditions. The proceeds of such disposition shall be retained by the handler making the disposition, except that, in case he disposes of the reserve of another handler, the proceeds from that disposition shall be divided between the handlers on the basis of a mutual agreement. Such authorization shall expire as of September 1 of the next crop year, and any reserve then remaining undisposed

of by the handler shall be returned to the Board. If the date of September 1 specified in § 981.66(e) is extended, the date of September 1 shall be extended correspondingly. Any handler who has been authorized to act as agent of the Board in disposing of his reserve may terminate such agency as of April 1 of the particular crop year by giving written notice to the Board to that effect not later than the previous March 20, in which event such handler shall return to the Board, for disposition by it, all reserve almonds remaining in his possession. In case a handler does not terminate his agency as of April 1, he shall be required to continue to serve as such agent until September 1 of the next crop year. The Board shall not terminate such an agency prior to September 1 unless the agent violates the terms and conditions specified by the Board or other provisions of the order. During the period of such agency the Board, as principal, shall not dispose of the reserve withheld from handling by said agent. The Board, *with the approval of the Secretary* may prescribe such rules and regulations as are necessary to regulate dispositions of reserve almonds including methods for crediting as reserve any salable almonds sold and delivered to reserve outlets.

Since the Order (promulgated on the basis of a formal rulemaking record, which is not challenged as to this issue) gives the *Board* the full power and authority to sell or dispose of all the reserve almonds, subject only to the conditions of the Order, and the Secretary's right to disapprove, it does not matter whether a handler is economically compelled to enter into an agency agreement. Whether or not there is an

agency agreement, the Board has complete power as to all reserve almonds. The Board must comply with the express provisions of the Order, and it is subject to the power of the Secretary to veto any Board action. But the Board does not have to seek handler approval or concurrence with respect to anything relating to the disposition of reserve almonds. For the purposes of this proceeding, the hearing record supporting the Board's plenary authority as to reserve almonds is not challenged.

Whether it was wise to give the Board complete authority to dispose of the reserve almonds as it sees fit, subject only to the conditions set forth in the Order and the Secretary's veto authority, is not open to question in this administrative review proceeding. Wisely or unwisely, under the Order, handlers have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds and, therefore, it is enough that the Secretary approved the minimum prices and assessments determined by the Board for the Program for almond butter and school lunches, without seeking the advice and consent of handlers, or promulgating the Board's determinations through APA rulemaking.

Assuming that the Secretary was required to promulgate through APA rulemaking the minimum prices and special assessments for reserve almonds disposed of for almond butter and school lunches, the Act does not authorize the award of consequential, monetary damages (as distinguished from a return of monies paid) (see § I, Additional Conclusions by the Judicial Officer), and, therefore, nothing could be done for petitioners here, even if the Secretary erred in this respect (which is not the case).

III. The Secretary Was Not Required to Allow Notice and Comment on the Rule Extending the Date for Disposing of Reserve Almonds from September 1, 1986, to March 1, 1987.

The ALJ held that it was error for the Secretary to fail to allow notice and comment on the rule issued August 20, 1986, and published August 25, 1986 (PX 25; 51 Fed. Reg. 30,203, 30,204 (1986)), extending the date for disposing of reserve almonds from September 1, 1986, to March 1, 1987, stating (Initial Decision at 5359):

> Petitioners argue that the Secretary's action on or about August 20, 1986, extending the date for disposing of reserve almonds from September 1, 1986 to March 1, 1987, violated the APA. Petitioners contend that the Secretary should have issued a proposed rule and allowed notice and comment. Instead, the Secretary merely issued a final rule. (PX 25)

Relying on the AMS field agent's report, Petitioners assert that the recommendation by the Board to extend the date for disposition of the reserve almonds was unfair. The report provides in relevant part:

> Chairman Walt Payne reported the recommendations and discussion of the Market Development Committee. Based upon the recommendation of the committee, the ABC recommended that the Secretary extend the effective date for disposition of reserve almonds from September 1, 1986, to March 1, 1987. This action is authorized under section 981.66(e) and would permit the industry to dispose of about 6.6 million

pounds of unsold reserve almonds over a longer period of time and so help prevent the sales from unduly depressing prices in the market. It also enables the industry to supplement the reduced 1986-87 crop supply by carrying over 6.6 million pounds from the large 1985-86 crop. The ABC motion was made on a nine to one vote, with Cloyd Angle voting in opposition. Mr. Angle, and certain others at the meeting indicated that they believed CAGE had taken advantage of its dominance in the industry and on the ABC in this action. They contended that when the low crop estimate for the 1986 crop was announced in April that CAGE stopped selling reserve almonds, confident that prices would increase and that CAGE could ensure a recommendation to the Secretary to extend the deadline for the sale of those almonds. CAGE, of course, controls 6 of the 10 ABC positions, enough for a voting majority. There is probably some validity to both CAGE's and Cloyd Angles's [sic] explanations for the recommendation, since CAGE almost certainly realized that an extension was both obtainable and desirable to it as a business, but also it seems clear that an extension would benefit the industry as a whole by stabilizing almond supplies over the 1986-87 season.

(RX 87) Petitioners argue that the fault with this report is that there is no analysis demonstrating that an extension would stabilize almond supplies over the 1986-87 season. The 1986 crop was extremely short and there was a larger demand than supply. But extending the date for disposition of almonds sold into non-competitive outlets would not help stabilize

almond supplies as reserve almonds were not intended to compete with salable almonds.

Petitioners contend that Blue Diamond "railroaded" the recommendation through because it would benefit their business. At the time of the proposal, Blue Diamond had 4.7 million pounds of the 6.6 million pounds of reserve almonds. Blue Diamond handled over sixty percent of the crop in 1985-86, and had over seventy-one percent of the remaining reserve obligation. (PX 134; Tr. 323-33) Section 981.67 of the Order provides that if a handler has not disposed of the reserve by September 1, the handler must turn over to the Board the undisposed of reserve, unless the date is extended pursuant to section 981.66(e), then this date is correspondingly extended. 7 C.F.R. §§ 981.66(e), .67 (1989).

The Board conducted an audit of companies that certified to the Board that they were purchasing almonds for use in almond butter. T he audit disclosed that one of the companies that Blue Diamond was selling to was not making almond butter. (PX 64; Tr. 348-552)

According to Petitioners, the audit combined with Blue Diamond's holding back their reserve almonds, added to the growing dissatisfaction of some of the handlers with the Program. (PX 62, 63; RX 75, 87, 88) As a result, the Secretary should have allowed notice and comment, even if it was for a shorter period than normally allowed.

Respondent argues that the Secretary properly invoked the good cause exception to providing for notice and comment in which the APA provides that notice and comment rulemaking is not required: "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons

therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (1988). Respondent contends that notice was both impracticable and unnecessary. The extension had to be effective September 1 as that was the date by which the reserve must have been sold. The recommendation was voted on at the July 30, 1986 meeting. The Secretary then considered the information that had been submitted by the Board and issued a decision within approximately three weeks. The rule appeared in the *Federal Register* on Monday, August 25, 1986. (PX 25)

Respondent asserts that prior notice was unnecessary since the possibility of an extension was discussed in committee meetings and a Board meeting, at which any interested person could have made known his views and those views would have been transmitted to the Secretary for consideration. (PX 39, 62; RX 88)

The Secretary in the final rule stated that an emergency situation existed and as a result there was not enough time for notice and comment (PX 25):

> It has been determined that an emergency situation exists which warrants publication of this final rule without prior opportunity for public comment. This action will relax a restriction on handlers by allowing them additional time to sell their 1985-86 crop year reserve almonds beyond the current September 1, 1986, deadline. Therefore, this action should take effect on or before September 1, 1986, and consequently, there is not sufficient time to issue a notice of proposed rulemaking soliciting comments from the public.

> Therefore, pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice of rulemaking and other public procedure with respect to this emergency action are impracticable and contrary to the public interest, and that good cause is found for making this emergency final action effective less than 30 days after publication of this document in the Federal Register.

The good cause exception to notice and comment is an emergency procedure, which must be interpreted narrowly, and used only when the delay attendant to notice and comment rulemaking would do real harm. *Buschmann*, 676 F.2d at 357; *United States Steel Corp. v. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979). "As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not `escape clauses' that may be arbitrarily utilized at the agency's whim." *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Examples of where the good cause exception has been found to have been properly applied were explained in *South Carolina v. Block*, 558 F. Supp. 1004, 1018 n. 18 (D.S.C. 1983):

> Courts have found good cause several times in cases involving government price controls, because the announcement of future controls could cause severe undesirable market distortions. *See De Rieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Em. App.), *cert. denied*, 419 U.S. 896 (1974); *Nader v. Sawhill*, 514 F.2d 1064 (Em. App. 1975). The exception has been approved concerning regulations on gas stations where shortages and discriminatory prices had led to deprivations of

supply and violence. *Reeves v. Simon*, 507 F.2d 455 (Em. App. 1974), *cert. denied*, 420 U.S. 991 (1975). It has also been permitted when the exigencies of a foreign relations crisis made an imperative response essential. *Narenji v. Civiletti*, 481 F. Supp. 1132 (D.D.C. 1979); *cf. Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980).

The examples illustrate that the good cause exception requires a true emergency with exigent circumstances. Courts have warned that such emergency situations are rare and that courts will closely scrutinize the reasons used for dispensing with notice and comment. *American Fed'n of Gov't Employees*, 655 F.2d at 1157 n. 6; *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

There was no emergency in this case. It is true that there was a short period of time from the Board meeting, on July 30, until September 1, the date by which reserve almonds must have been sold. Yet, there was ample time with which to allow a notice and comment period. The Secretary could have shortened the comment period and still met the September 1 deadline.

The Secretary had to have known from the Order that such a situation could present itself, when the deadline set in the Order for disposal of reserve almonds was September 1. Courts have rejected an agency's reliance on the good cause exception where the so-called emergency was solely the result of the agency's own creation of deadlines, or merely a reflection of a desire for administrative efficiency. *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983);

Sharon Steel Corp. v. E.P.A., 597 F.2d 377, 380 (3rd Cir. 1979); *South Carolina*, 558 F. Supp. at 1018.

The Secretary stated in the final rule that there was not sufficient time to allow notice and comment. The Secretary provides no other reason for failing to provide notice and comment. Since deadlines alone cannot equal good cause, the Secretary failed to provide a good cause for dispensing with notice and comment. Mere recitation that there was good cause does not create good cause, [nor] does a desire to provide immediate guidance. *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d at 803.

Notice and comment should have been allowed especially since there was an intense disagreement among the handlers over whether the date for disposition should have been extended. Blue Diamond had seventy-one percent of the almonds still in reserve and stood to benefit greatly if the almonds were released. The independent handlers should have been granted the right to comment as this was a significant decision affecting the almond industry. Prior comment at the Board meeting cannot substitute for the requirement of notice and comment contained in the APA. Not all who wanted to comment might have been present at the Board meeting. In addition, notice and comment allows anyone, not merely handlers in the industry, to comment. This would give someone a chance to comment who might not have known about the Board meeting. If this kind of prior comment could substitute for the notice and comment required, Congress would have so specified.

Additionally, Petitioners argue that the Secretary's decision to extend the reserve was arbitrary and capricious. However, there is no need to consider that issue as I find that the Secretary violated the

APA in promulgating the rule, and as such the regulation is invalid. *Buschmann*, 676 F.2d at 355-56.

As mentioned above, an audit was conducted of companies buying almonds to manufacture almond butter, and one company admitted that it was not manufacturing almond butter. As a result, Petitioners argue that it is a violation of the AMAA and the Order that individual handlers were allowed to keep the proceeds from the sale of exempt reserve almonds to almond butter, almond oil, and/or cattle feed, rather than having the Board divide the proceeds pro rata among all of the handlers. Petitioners complain that a number of handlers, including Blue Diamond were able to find outlets for almond butter while the Petitioners were not. Petitioners charge that one reason that Blue Diamond found an outlet was because the company, disclosed by the audit, was buying almonds not for use in almond butter but for resale. Petitioners argue that all handlers should have had the same chance to sell almonds into the same outlets, but because they did not, they should now get to share in the profits earned by those who did find outlets for almond butter. Thus, the Board should collect the profits and distribute them pro rata among all of the handlers.

Petitioners appear to be requesting a remedy. There is no provision in either the AMAA or the Order which allows for such a remedy. Further, Petitioners fail to explain how there was a violation of the AMAA. The Order, as authorized by the AMAA, provides that if a handler turns his almonds over to the Board, the Board will dispose of the almonds and then distribute to the handler his pro rata share of the profits, less any expenses. 7 U.S.C. §§ 608c(6)(C)-(E) (1988); 7 C.F.C. § 981.66 (1989). But Petitioners did

not turn their almonds over to the Board. Instead they signed an agency agreement and chose to retain control over the disposition of their reserve almonds. 7 C.F.R. § 981.67 (1989). (Tr. 87-88, 160)

It is true that the audit revealed that abuses occurred in the administration of the Program. This demonstrates a need in the future for a closer monitoring of the Program, or similar undertakings by the Board.

In the first place, since the Secretary's challenged action *relaxed* a regulatory requirement otherwise in effect, there is no basis for petitioners to challenge that action in a § 8c(15)(A) proceeding. Under the plain terms of the Act, a handler's petition under § 8c(15)(A) of the Act is limited to "stating that any such order or *any provision of any such order or any obligation imposed in connection therewith* is not in accordance with law *and praying for a modification thereof or to be exempted therefrom*," and the Secretary is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A) (emphasis added)).

The provisions of the Order authorize the Secretary to extend the September 1 deadline, as follows (7 C.F.R. § 981.66(e)):

> (e) *Disposition after September 1.* Any reserve almonds remaining unsold as of September 1 shall be disposed of by the Board as soon as practicable through the most readily available reserve outlets. The date of September 1 herein specified may be extended to a later date by the Secretary, upon recommendation of the Board or other information.

Those provisions of the Order are not challenged by petitioners, so petitioners are not challenging the

"order or any provision of any such order" (7 U.S.C. § 608c(15)(A)), in this respect. Furthermore, petitioners are not challenging any "obligation imposed [upon them] in connection therewith" (7 U.S.C. § 608c(15)(A)). Rather, petitioners are complaining that other handlers benefitted from this relaxation of the obligations, and that they did not. Since petitioners are not complaining in this instance of the Order, or any provision of the Order, or any obligation imposed upon them under the Order, they have no standing to seek redress in this § 8c(15)(A) proceeding. Even if they did have standing, since consequential damages cannot be awarded (as distinguished from a return of monies paid), no relief could be provided to petitioners in this proceeding (see § I, Additional Conclusions by the Judicial Officer).

In addition, the ALJ's conclusion fails to take notice of the undisputed realities of government rulemaking. The Board recommended the extension on July 30, 1986, based on then current information and a Board meeting held that day. As the ALJ notes elsewhere in his decision, the Secretary does not simply rubber-stamp such recommendations. The specialists in the Fruit and Vegetable Division of the Agricultural Marketing Service must review all of the material (minutes, reports, and the like) submitted with the recommendation. They must prepare an analysis and recommendation which goes through several layers of review both within AMS and other agencies of the Department (*e.g.*, the General Counsel's office). This process, all of which precedes publication, often takes substantially more than a month. In this case, the rule had to be issued by September 1, 1986, one month after the Board's

recommendation, thus preventing publication for comment.

The ALJ's citation of *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983), concerning "the agency's own creation of deadlines" (Decision, p. 57), is inapposite. The September 1 deadline was pre-existing and a permanent part of the Order. 7 C.F.R. § 981.66(e). That part of the Order containing the September 1 deadline was promulgated upon the basis of evidence adduced at a formal rulemaking hearing, the adequacy of which is not challenged by petitioners. In any event, it is obvious that when you are dealing with a new crop each season, there should be some deadline for disposing of the prior year's crop, so that the two seasons do not overlap more than is desirable in order to have supplies for sale before the new crop receipts are on hand at the beginning of the marketing year (July 1). The September 1 deadline is not an artificial deadline created by the agency for administrative efficiency, but, rather, is a reasonable deadline established on the basis of an unchallenged formal rulemaking record, demonstrating the need for disposing of each year's crop within a reasonable period.

Even if we were to assume (with no basis in the present record) that the September 1 deadline is unwise, it is, nonetheless, there in the Order, and it is binding unless extended by the Secretary. Accordingly, since the Secretary determined that it was desirable to extend the deadline from September 1, 1986, until March 1 of the next year, the Secretary's action had to be taken by September 1, 1986, to prevent action from being taken pursuant to the September 1 deadline.

The ALJ did not consider whether extending the time for disposing of the reserve was arbitrary and

capricious, but there is no merit to petitioners' contentions, in this respect. Although it is true that the reserve would not normally be sold in competition with saleable almonds not subject to the reserve, the informal rulemaking record and the Secretary's final rule show that there was a projected short 1986-87 almond crop, and that extending the deadline for disposing of the 1985-86 reserve until March 1, 1987, enabled the Board to have almonds available for the Program for almond butter and school lunches, without the need for a reserve to be established from the short 1986-87 crop.[19] Hence there was a rational basis in the informal record for the Secretary's action (PX 62, 63; RX 75, 87, 88).

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[19] There is statutory authority for the establishment of a reserve for a marketing development program, even in a season where the supply-demand situation would not permit a reserve for supply- management purposes. 7 U.S.C. §§ 602(3), 608c(6)(E), (I). The Order also authorizes such a reserve. Specifically, the Order provides that reserves are authorized when they "would tend to effectuate the declared policy of the Act" (7 C.F.R. § 981.47). The declared policy is, inter alia, to establish orderly marketing conditions to foster adequate returns for growers (7 U.S.C. § 602). The Secretary can certainly find that the creation of additional outlets for a commodity will increase returns to growers. Furthermore, contrary to petitioners' assertions that the language of §§ 47, 48 and 49 of the Order (7 C.F.R. §§ 981.47, .48, .49) are mandatory, those sections give the Secretary wide discretion. For example, "the Secretary shall give consideration to . . ." (7 C.F.R. § 981.47); "the Secretary *may* increase the salable percentage" (7 C.F.R. § 981.48) (emphasis added); and "the Secretary . . . may act . . ." (7 C.F.R. § 981.49).

IV. Section 981.441 of the Order Does Not Violate § 8c(10) of the Act, Which States That No Order Shall Prohibit, Regulate, or Restrict the Advertising of Any Commodity or Product Covered by the Order.

The ALJ held that § 981.441 of the Order violates § 8c(10) of the Act (7 U.S.C. § 608c(10)), because it regulates and restricts the advertising of almonds by handlers. The ALJ states (Initial Decision at 65-66):

> Second, Petitioners argue that sections 981.41 and 981.441 of the Order violate section 8c(10) of the AMAA. 7 U.S.C. § 608c(10) (1988). Section 8c(10) provides (emphasis added):
>
> > (10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. *No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.*

Petitioners argue that sections 981.41 and 981.441 compel handlers to spend their own money to advertise, while prohibiting many forms of advertising in which a handler can engage. This is a prohibition on

the advertising of a commodity and section 8c(10) makes no exceptions.

Respondent argues that Petitioners conceded that there is no restriction on what they may advertise. (Tr. 435) In fact, Petitioners admit that they have published advertisements for which they did not receive credit. Yet, they argue that their advertising is regulated because of the provisions which explain what kind of advertisement will be considered as credit toward the advertising assessment. Section 981.41 does not compel handlers to advertise, they may pay their assessment directly to the Board.

Section 981.441 of the Order violates section 8c(10) of the AMAA because it regulates and restricts advertising. Section 8c(10) is absolute in its applicability that no Order shall prohibit, regulate or restrict the advertising of a commodity. *Black's Law Dictionary* defines "regulate" as follows: "To fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." *Black's Law Dictionary* 1156 (5th ed. 1979). Section 981.441 in its simplest form is a regulation, regardless of whether it compels handlers to advertise. While section 981.441 does not prohibit advertising, it certainly regulates and restricts advertising that handlers must utilize in order to receive credit toward their assessments.

Respondent's argument that Petitioners conceded that there is no restriction on what they may advertise, is a mischaracterization of the statement made by Petitioners' counsel. The statement was that Petitioners would "stipulate that the Board does not get involved at all in advertising unless it has to do with creditable advertising assessments." (Tr.435)

What is at issue is the Board's involvement with advertising due to the advertising assessments.

In reality, handlers do not have a choice. They must either pay the money directly to the Board or advertise in the manner required by section 981.441. Their only sound business decision is to advertise, hoping that it will lead to increased sales. Simply paying the money directly to the Board provides no opportunity to increase revenues.

I disagree with the ALJ's views. The ALJ quotes Black's Law Dictionary on the meaning of the word regulate. Although his definition is correct, he applies it to the wrong regulation. The Order is regulating a handler's *ability to receive credit*; it is not regulating his advertising. This is self-evident from the terms of § 41 of the Order and § 441 of the regulations (7 C.F.R. §§ 981.41, . 441). Furthermore, petitioners themselves concede that there is no regulation or restriction whatsoever on what they may advertise (Tr. 435). They have published many advertisements that would be in violation of § 981.441, if that section, as the ALJ erroneously held, actually regulated advertising. (Tr. 78-82, 178). Thus, by their own actions, petitioners have established that the Order does not regulate advertising, and did not prevent petitioners from publishing advertisements which did not qualify for credit.

Assuming that the ALJ were correct, i.e., that the provisions of § 981.441 were a regulation of advertising (which is not the case), this would not violate 7 U.S.C. § 608c(10) because § 981.441 applies only when a handler so chooses. The ALJ correctly notes that: "Section 981.41 does not compel handlers to advertise, they may pay their assessment directly to the Board" (Initial Decision at 6566). The ALJ, however, goes on

to say that "handlers do not have a choice" (Initial Decision at 66). He bases this finding on his determination that it is their only sound business decision because: "Simply paying the money directly to the Board provides no opportunity to increase revenues." (Initial Decision at 66).

First, as noted in § II of the Judicial Officer's additional conclusions, the fact that one of several choices is economically beneficial does not render the other choices nugatory, nor does it mean that there is no choice.

Moreover, the ALJ has substituted his judgment not only for that of the Secretary, but, also, of Congress as well. Congress amended the Act specifically to permit marketing order provisions which would permit boards (such as the Almond Board) to undertake marketing promotion (including advertising programs) with money paid directly to the Board. Because the purpose of the Act is to benefit the commodity industries (farmers and handlers) regulated by the Act, Congress necessarily concluded that paying money directly to the Board *will* provide an opportunity to increase revenues. Furthermore, the Secretary necessarily reached the same conclusion in issuing §§ 981.41 and 981.81, which were issued upon the basis of a formal rulemaking record which is not challenged by petitioners, in this respect. Therefore, to the extent the ALJ based his conclusion on his view that paying money to the Board will not increase revenues, it is erroneous. Furthermore, as stated in the material added in brackets to Finding 64, Dr. John Baritelle, Agricultural Economist, University of California at Riverside, conducted a study showing that the returns to the almond industry from almond

advertising under the Order substantially exceed the expenditures.

In addition, assuming *arguendo* that § 981.441 does regulate advertising and that the fact that handlers may choose whether to be subject to § 981.441 is of no consequence, § 981.441 still does not violate 7 U.S.C. § 608c(10).

In construing the relevant statutory provisions (7 U.S.C. §§ 698c(6)(I), (10)), it is significant that § 8c(10), which provides that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby," was included in the Act in 1935 (Pub. L. No. 320, 49 Stat. 750, 758 (7 U.S.C. § 608c(10) (1935)), when there was no provision in the Act relating to projects for marketing promotion including paid advertising. Congress added the authority for projects for marketing promotion including paid advertising (originally applicable only to cherries) in 1962 (Pub. L. No. 87-703, 76 Stat. 605, 632 (7 U.S.C. § 608c(6)(I) (1962))), 27 years after the Act was enacted. Congress added the authority for crediting advertising expenditures against assessments in 1970, when it also added almonds, as a commodity which could be the subject of projects for marketing promotion including paid advertising (Pub. L. No. 91-522, 84 Stat. 1357 (7 U.S.C. § 608c(6)(I) (1970))). Section 8c(10) (7 U.S.C. § 608c(10)), enacted in 1935, therefore, did not contemplate any advertising pursuant to a marketing order. More specifically, when Congress prohibited the regulation of advertising in 1935, Congress did not contemplate limiting the Secretary's right to regulate expenditures for advertising that are credited towards handler's assessment obligations.

Section 8c(6)(I), as amended, states that orders may provide for crediting a handler's assessment obligations "with all or any portion of his direct expenditures for *such* marketing promotion including *paid advertising as may be authorized by the order*" (7 U.S.C. § 608c(6)(I) (emphasis added)). Because, as the ALJ notes, the word "regulate" is so broad, the limitations in § 8c(6)(I) (emphasized in the preceding sentence) would be rendered meaningless, if the Secretary could in no way regulate the manner of giving a handler credit for paid advertising. The Secretary would, arguably, not even be able to verify that the money was spent or that the advertisement was primarily to sell almonds, as these reasonable conditions of establishing eligibility for credit are now done by regulation. This is a result Congress cannot have intended. The Act is intended to benefit producers, handlers, and consumers of the various regulated commodities and to help farmers obtain a fair value for their agricultural products. (*See* 7 U.S.C. §§ 601, 602; *United States v. Rock Royal Co-Op, Inc.*, 307 U.S. 533 (1939); *Zuber v. Allen*, 396 U.S. 168 (1969); *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985)). Advertising, as authorized by the Act, can serve this function only if it relates to the commodity being regulated. Almond farmers cannot benefit by advertisements promoting, for example, grocery stores or competing nuts. (These are two of the restrictions which § 981.441 puts on a handler's ability to receive credit for advertising). If, however, the ALJ were correct in his application of 7 U.S.C. § 608c(10), an almond handler could advertise grocery stores or competing nuts or political issues and, by including a reference to almonds, receive credit under the almond program for such expenditures This is

because the ALJ has found that the Secretary cannot in any way regulate the advertising a handler does and submits to the Board for credit. This is contrary not only to the clearly expressed intent of Congress, but to the express words of the Act that credit should be for "such marketing promotion including paid advertising as may be authorized by the order" (7 U.S.C. § 608c(6)(I)). Hence the Act must be construed to authorize reasonable provisions ensuring that advertising, to be eligible for credit towards a handler's obligations, actually promotes the sale of almonds.

Several principles of statutory interpretation support this interpretation of the Act. First, where two provisions of an amended statute seem to be in conflict, "the provisions of the amendment must prevail over those of the original statute on the theory that the former [the amendment] constitutes the last expression of the will of the legislature" (Crawford, *The Construction of Statutes* 617-18 (1940)). In this case, § 8c(6)(I) is more recent than §§ 8c(10) (7 U.S.C. §§ 608c(6)(I), (10)).

Second, when there is a conflict, the more specific section controls the general. Crawford, *The Construction of Statutes* 265 (1940), and *2A Sutherland Stat. Const.* § 46.05, at 92 (4th ed. 1984). See, also, *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). Here, 7 U.S.C. § 608c(6)(I) deals with a very specific advertising program, and crediting assessments for expenditures under the program, while 7 U.S.C. § 608c(10) is a general provision.

Third, one is to look to the congressional intent to resolve any ambiguity. As demonstrated previously, Congress intended the advertising program, in-

cluding the availability of credit, to benefit almond farmers, which would not occur if handlers could advertise other items and receive credit. In this context, it is instructive to note the following comment from a treatise on statutory construction: "It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *2A Sutherland Stat. Const.* § 45.12, at 54 (4th ed. 1984). See, also, *United States v. Brown*, 333 U.S. 18, 26-27 (1948); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940).

Fourth, the contemporaneous and settled administrative construction, which construes the Act as authorizing the type of provisions challenged here, is entitled to considerable weight.[20]

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[20] *Allen M. Campbell Co. Gen. Contractors, Inc. v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966). See, also, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n. 6 (1940); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 335 (1933); *United Truck Lines, Inc. v. ICC*, 189 F.2d 816, 817 (9th Cir.), *cert. denied*, 342 U.S. 830 (1951); *L. Gillarde Co. v. Joseph Martinelli & Co.*, 169 F.2d 60, 60-61 (1st Cir.), *cert. denied*, 335 U.S. 885 (1948); *Armstrong Co. v. Walling*, 161 F.2d 515, 517 (1st Cir. 1947); *Superior Packing Co. v. Porter*, 156 F.2d 193, 195 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Bowles v. Mannie & Co.*, 155 F.2d 129, 133 (7th Cir.), *cert. denied*, 329 U.S. 736 (1946); *Bowles v. Cudahy Packing Co.*, 154 F.2d 891, 892 (3d Cir. 1946); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy*

Finally, petitioners seem to be challenging the wisdom of the creditable assessment program, and the ALJ appears to be basing his decision, at least in part, on a similar theory. Petitions under 7 U.S.C. § 608c(15)(A) are not the forum for such challenges. *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85C1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987).

V. The Secretary Was Not Required by the APA to Allow Notice and Comment on the Annual Rules From 1980-86 Establishing the Assessment Rate, Including the Creditable Portion Thereof.

The ALJ held that the Secretary should have allowed notice and comment pursuant to the APA on the annual rules from 1980-86 establishing the assessment rate, including the creditable portion thereof, stating (Initial Decision at 72-74):

Petitioners also argue that the annual rules, from 1980-86, did not comply with the notice and comment provisions of the APA. Petitioners contend that there was ample time to issue a proposed rule and a final rule as was done for the years 1987-89.

Respondent counters that the Secretary did not allow notice and comment because it was a waste of money and impracticable given the time and resources available, especially since the assessment rate is determined by an arithmetic formula. Respondent also argues that the budget approval process for the Board is similar to the budget approval process, for example, of the Office of the General Counsel

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Corp., 32 Agric. Dec. 1004, 1055, *aff'd*, 369 F. Supp. 632 (S.D.N.Y. 1973).

("OGC") and the Office of Administrative Law Judges ("OALJ") of the Department and the Secretary is not required to employ notice and comment for the OGC or the OALJ. Respondent also contends that all interested parties were aware of the Board's recommendations.

The handlers were entitled to notice and comment in connection with the annual rules from 1980-86. As discussed previously, the exception to notice and comment contained in section 553 of the APA applies only to true emergency situations. 5 U.S.C. § 553 (1988). That the Department might want to save money is not an emergency situation. The rights of individuals are not to be forfeited in order to save a little money.

Respondent analogizes the budget process required by the Order to the Department's budgets for its agencies such as the Office of Administrative Law Judges, Office of the General Counsel and Agricultural Marketing Service. Such internal agency budgets are rules of "agency organization, procedure or practice" which are excepted from the rulemaking requirement by 7 U.S.C. § 553(b)(B). However, as explained by the court in *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980) [footnotes omitted]:

> The exemption cannot apply, however, where the agency action trenches on substantial private rights and interests. As the case law demonstrates, substantial rights and interests in this light have come into play when railroads are directed to file proposed schedules of rates and tariffs with subscribers; when applicants for food stamps are subject to modified approval procedures; when drug producers are subject to new

specifications for the kinds of clinical investigations deemed necessary to establish the effectiveness of drug products prior to FDA approval; and when motor carriers are subject to a new method for paying shippers.

Here, recipients of CETA emergency job program monies are subject to a new method for determining the one undefined variable in the statutory fund allocation formula. Although the methodology itself may look procedural, as Judge McGowan noted in a similar context, "[t]he characterizations `substantive' and 'procedural' no more here than elsewhere in the law—do not guide inexorably to the right result, nor do they really advance the inquiry very far." The critical question is whether the agency action jeopardizes the rights and interest of parties, for if it does, it must be subject to public comment prior to taking effect. As that is the case here, the exemption cannot apply.

The budget process required by the Order is not analogous to the Department's internal budget process. Significantly, the internal budgets of the Department do not involve assessments. The assessments required to be paid by handlers [have] a substantial impact upon their private rights and interests and, therefore, the handlers should have been afforded an opportunity to participate in the rulemaking process by notice and comment.

Respondent's argument that it was impracticable given the amount of time, for the Secretary to issue a proposed rule also lacks merit. The Secretary issued proposed and final rules from 1987-89. This demonstrates that there was ample time to issue proposed

and final rules for the creditable assessment rate. Additionally, the Secretary could have promulgated an interim rule, pending obtaining notice and comment for a final rule.

Respondent contends that handlers had an opportunity to participate in the Board's discussion of its recommendation to the Secretary by appearing at Board meetings. However, such participation is not a substitute for the procedural guarantees of the APA. Respondent's argument also assumes that the Secretary will automatically approve the Board's recommendation. However, the Secretary has the discretion not to follow the Board's recommendation.

While Respondent contends that notice and comment are unnecessary since the assessment rate is determined by an arithmetic formula, the APA requires otherwise. Whenever an agency imposes a rate upon individuals, the APA must be followed. 5 U.S.C. § 551(4) (1988). That a formula is used to determine the assessment rate is not good cause for disposing with notice and comment, as explained earlier. All aspects of the budget are discretionary. The Board prepares the budget and submits it to the Secretary for approval. The Secretary need not accept the budget. Petitioners, as well as the other handlers, are entitled to submit comments to the Secretary regarding the budget and assessment rate as it affects their rights. Board meetings cannot substitute for the public participation required by the APA. The rights and interests of the handlers cannot be disregarded simply because there is a formula for determination of the assessment rate.

The Secretary's final rule for the 1980-81 crop year, which is typical of the final rules for the 1981-82 through the 1986-87 crop years (RX 96, 103, 106, 110,

115, 119), states as follows (RX 94; 45 Fed. Reg. 56,793 (1980)):

> Pursuant to Marketing Order No. 981, as amended (7 CFR Part 981), regulating the handling of almonds grown in California, effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and upon the basis of the recommendations and information submitted by the Board, established under this marketing order, and upon other information, it is found that the expenses and rate of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.
>
> It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking and postpone the effective time until 30 days after publication in the Federal Register (5 U.S.C. 553), as the order requires that the rate of assessment for a particular crop year shall apply to all assessable almonds handled from the beginning of such year which began July 1, 1980. To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expenses and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the act it is necessary to make these provisions effective as specified.
>
> . . . .

§ 981.330 Expenses and rate of assessment.

(a) Expenses that are reasonable and likely to be incurred by the Board during the 198081 crop year, will amount to $8,798,833.

(b) The rate of assessment for said year payable by each handler in accordance with § 981.81 is fixed at 2.8 cents per pound of almonds (kernelweight basis), less any amount credited pursuant to § 981.41 but not to exceed 2.5 cents per pound of almonds (kernelweight basis).

In *In re Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705, slip op. at 77-86 (July 9, 1990), *appeal docketed*, No. CV F 90-473-EDP (E.D. Cal. July 27, 1990), I ruled on the same issue under the Nectarine and Plum Marketing Orders that is involved here. Specifically, I held that since the final rule announcing the assessment rate sets forth a statutorily-required ministerial calculation, good cause exists for dispensing with notice-and-comment rulemaking. My views there, which are equally applicable here, are set forth in their entirety, without the usual indentation used for quoted material, as follows:

EXCERPT FROM WILEMAN I

No issue is raised as to the statutory authority of the Secretary to collect assessments, including assessments to pay for advertising, but these statutory provisions are, nonetheless, vital to the APA issue raised by petitioners. The Act provides (7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii)-(iii) (emphasis added)):

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including fruits] orders issued pursuant to this section *shall contain one or more of the following terms and conditions, and* (except as provided in subsection (7) of this section), no others:

. . . .

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided, That with respect to orders applicable to . . . plums [or] nectarines, . . . such projects may provide for any form of marketing promotion including paid advertising* and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . .

. . . .

(ii) *Each order* relating to any other commodity [i.e., other than milk] or product issued by the Secretary under this chapter *shall provide that each handler* subject thereto *shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable* and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order . . . . The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) *Any authority or agency established under an order may maintain* in its own name, or in the name of its members, *a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses.* The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

Similarly, no issue is raised as to the validity of the Marketing Order provisions requiring each handler to pay his *pro rata* share of all expenses found by the Secretary to be reasonable, including expenses for advertising, but these provisions of the regulations are, nonetheless, vital to the APA issue raised by petitioners. The Nectarine Order provides (7 C.F.R. §§ 916.3 [1](c), .40, .41, .45 (emphasis added)):

§ 916.3[1] Duties.

The committee shall have, among others, *the following duties*:

. . . .

(c) To submit to the Secretary as soon as practicable *after the beginning of each fiscal period* a budget for such fiscal period, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such period;

. . . .

§ 916.40 Expenses.

The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by the committee for its maintenance and functioning and to enable it to exercise its powers *and perform its duties in accordance with the provisions of this part.* The funds to cover such expense shall be acquired in the manner prescribed in § 916.41.

§ 916.41 Assessments.

(a) *As his pro rata share of the expenses which the Secretary finds are reasonable and likely to be incurred by the committee during a fiscal period, each person who first handles nectarines during such period shall pay to the committee, upon demand, assessments on all nectarines so handled.* The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) *The Secretary shall fix the rate of assessment to be paid by each such person during a fiscal period in an amount designed to secure sufficient funds to cover the expenses which may be incurred during such period and to accumulate and maintain a reserve fund equal to approximately one fiscal period's expenses.* At any time during or after the fiscal period, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any later finding by the Secretary relative to the expenses which may be incurred. Such increase shall be applied to all nectarines handled during the applicable fiscal period. In order to provide funds for the administration of the provisions of this part during the first part of a fiscal period before sufficient operating income is available from assessments on the current year's shipments, the committee may accept the payment of assessments

in advance, and may also borrow money for such purposes.

. . . .

§ 916.45 Marketing research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. *Such projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916.41.*

The Plum Order provides (7 C.F.R. §§ 917.35(f), .36, .37, .39 (emphasis added)):

§ 917.35 Powers and duties of each commodity committee.

Each commodity committee shall have the following powers and duties:

. . . .

(f) To submit as soon as practicable after the beginning of each fiscal year to the Secretary, for his approval, a budget of its expenses for such fiscal period, including its proportional share of the expenses of the Control Committee and an explanation of the items therein, and a recommendation as to the rate of assessment for the respective fruit for which the commodity committee was established.

. . . .

§ 917.36 Expenses.

Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research and service activities relating to handling of the fruit for which the commodity committee was established *as the Secretary may determine to be appropriate.* The funds to cover such expenses shall be acquired by the levying of assessments as provided in § 917.37.

§ 917.37 Assessments.

(a) *As his pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the Control Committee, upon demand, assessments on all fruit handled by him.* The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) *The Secretary shall fix the respective rate of assessment which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses which may be incurred during such period.* At any time during

or after the fiscal period, the Secretary may increase the rates of assessments in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period.

. . . .

§ 917.39 Production research, market research and development.

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. *Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37.*

With respect to petitioners' cross-appeal, I am in complete agreement with the ALJ's holding that notice-and-comment rulemaking is not required for the Secretary's approval of any of the Committees' expenses, including advertising expenses. The ALJ's views, which coincide with my own, are as follows ((Initial Decision at 338-44) (emphasis supplied by the ALJ); a few omissions (indicated by three dots) and additions (indicated by brackets) are by the Judicial Officer):

In order to understand the nature of the assessment claims, one must first appreciate the essential nature of Marketing Order Administrative Committees, which, of course, incur expenses in

the administration of the Orders. In the case of the Committees under Marketing Orders 916 and 917, the expenses are of three general categories: Committee administration expenses (*e.g.*, office expenses; vehicle and travel expenses; wages and benefits for the Committees' paid staff, the California Tree Fruit Agreement; expenses for information collection, storage, compilation, dissemination; meeting expenses); research, promotion; and advertising expenses, which may include the cost of horticultural research; cost of marketing surveys and studies; cost of seeking new shipment and marketing techniques and outlets; cost of developing promotion and advertising programs and materials; costs of radio and television commercials and time; and inspection expenses (*i.e.*, primarily the wages and expenses of the inspectors for inspecting and grading the fruit). While expenses in all categories peak during the harvest and marketing periods, substantial expenses are incurred and must be paid over the entire year, particularly for administration, and research, promotion and advertising. The Order 916 and 917 Committees are organized on a fiscal year basis which begins on March 1 of each year (7 C.F.R. 916.7, 917.9). The Committees are required to develop and submit to the Secretary for approval a budget of their anticipated expenses for each fiscal year (7 C.F.R. 916.31(c) and 917.35(f)).[14] A budget

[14] The exhibits and the testimony at the oral hearing, particularly of the Committees' Manager Jon Field, are replete with details of the type of studies and projects that are included in the budget. The hearing record also reveals that there is a Research and Promotion Subcommittee (e.g., Ex. 22) that holds public meetings to develop and debate these projects

> is discussed and approved at the May Committee meeting and sent to the Secretary. (Ex. 2, N-1-A; Ex. 3, P-1-B). The budget items are also described in detail in the Marketing Policy sent to the Department (Ex. 8, AMS- [2]-H). Various Field Office memoranda also contain information in this regard (*e.g.*, Ex. 8, AMS-1, Memorandum of 5/20/87)
> . . . .

Therefore, the Secretary has before him a broad record of information and material *to be analyzed and considered when considering budget approval.* Furthermore, the Secretary has a background in the past projects and . . . their effectiveness under these and other Marketing Orders. The Secretary's review also starts from the premise created by the unchallenged formal rule making records that the funding of administrative, promotion and inspection activities is something desirable. Thus, the Secretary's decision to approve a budget is not lacking in reason and cannot be regarded as something that is arbitrary or capricious or lacking in substantial evidence.

I have not been convinced that budget approval by the Secretary is something that is required to be accomplished through rule making under the Agricultural Marketing Agreement Act. There is no requirement in that statute that the Secretary employ notice and comment for Committees' budgets[15] and

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and a Management Services Committee that coordinates the share of these joint expenses that are to be attributed to each of the regulated commodities.

[15] The Secretary's right to approve the budgets of the Committees without notice and comment rulemaking is the same as his right to approve, without notice and comment rulemaking, the budgets of his other agencies, such as the Office of Ad-

any such requirement would have to be forthcoming from the provisions of the Administrative Procedure Act, or, partake of a "taxing" function, which would be beyond the scope of the Secretary's powers. It is true that the budgets of these Committees [and other USDA agencies whose budgets are approved by the Secretary without notice and comment rulemaking] affect payments from others, whether they be general taxpayers, fruit handlers, or recipients of some other fee-based Government service. But in all cases this ultimately is a case of Secretarial discretion in approving the expenses of the Committees which *in themselves* impose no direct financial requirements on others. The Secretary is not forbidden from seeking further public input through a Federal Register publication regarding the budget of the Committees [or any of the Secretary's agencies] and . . . has done so on some isolated occasions. Much more typically, however, he has merely announced that the budget and certain expenditures of the Committees [or other agencies] have been approved and authorized. The key legal point, however, is that there is no requirement in the law that the Secretary seek notice and comment regarding such budget authorization.

The law does require that the levy of an assessment be done by means of a regulation. The *assessment is the imposition of a direct rule on handlers that they pay a fixed amount of money pro rata or find themselves in violation of law and subject to criminal and civil sanctions.* In setting this assessment rate,

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ministrative Law Judges, the Office of the General Counsel, the Agricultural Marketing Service, its Fruit and Vegetable Division, or its Marketing Order Administration Branch.

the Secretary, while subject to requirements under the Administrative Procedure Act, is also subject to the requirements of the Agricultural Marketing Agreement Act and the Marketing Orders. Section 10(b)[(ii),] (iii) of the Agricultural Marketing Agreement Act (7 U.S.C. 610(b)[(ii),] (iii)), provides that each handler subject to a Marketing Order shall pay a *pro rata* share of the expenses of the Committee, *which are approved by the Secretary*, during the entire period. The Marketing Orders in question (7 C.F.R. 916.41, 917.37) follow this requirement of the Agricultural Marketing Agreement Act by requiring each handler to pay his *pro rata* share of all expenses during the fiscal period (March 1 through February 28 or 29) based on each handler's shipments during the fiscal period. The [unchallenged] formal rule making record indicates that, in furtherance of this *pro rata* requirement, *it was determined to have inspection expenses borne by the Committee, lest each handler have to contract separately for Inspection Service and pay a different rate because of factors such as the handler's location* (23 Fed. Reg. 3016-3017 [1958]). The Marketing Order provisions, based on the [unchallenged] formal rule making records, also implement the requirements of the Agricultural Marketing Agreement Act by specifically providing that assessments will be *levied retroactively* for the entire fiscal period to ensure that each handler pays his *pro rata* share of the expenses. Furthermore, the Marketing Orders anticipate that the assessment rate will not be promulgated by the Secretary at the beginning of each fiscal period. The Orders (7 C.F.R. 916.31(c), 917.35(f)) specify that the Committees will meet *after* the beginning of the fiscal period to determine their budget of expenses for the fiscal year.

Since the Secretary also needs an opportunity to review the budget before approving all of the expenses, the Marketing Orders require that the assessment regulation will always be enacted with a retroactive effective date. Furthermore, in accord with the Agricultural Marketing Agreement Act and the [unchallenged] formal rule making record, the Marketing Orders specify that the assessment rate will be determined by a simple mathematical calculation, dividing the total anticipated expenses by the total anticipated shipments (7 C.F.R. 916.41, 917.37). Under the same provisions of the Marketing Orders, supplemental assessment rates may be enacted later during the fiscal year, and must be applied retroactively to each handler for the entire fiscal year, if either the anticipated expenses or the anticipated shipments change during the year. (*See also* 23 Fed. Reg. 3014 [1958].) In order to avoid the burdens and confusion of issuing several supplemental assessments during each year, both Marketing Order Committees and the Secretary tend to prefer having the most accurate crop estimates before the issuance of the rate regulation. Finally, it should be noted that while the Committees send out billings before the enactment of the rate regulation based on the anticipated rate, no handler is legally required to pay such a billing until the rate regulation is enacted. Most handlers, however, find it more convenient to pay as they go, rather than be faced with one big billing that retroactively includes all shipments from the beginning of the fiscal year. Obviously, adjustments are made if the Secretary enacts a lower rate.

In summary, therefore, Petitioners' claims regarding assessment collection lack merit in this proceeding . . . . Notice and comment . . . is regarded

as impracticable and unnecessary since both the Agricultural Marketing Agreement Act and the Marketing Orders *require* that the assessment rate be derived by dividing the expenses by the shipments. There is no discretion in this regard, nor is there any discretion as to the period the rate will apply to, or, as to whether all handlers should pay the same rate. Thus, the statute and the Orders leave no issue unresolved on which meaningful comment could be submitted unless it would be by means of allowing interested parties the opportunity to contest the necessity and/or the amount of certain budgeted items, such as advertising and promotion. By approving the Committees' budgets, the Secretary has indicated he approves of their expenditures. [Furthermore, interested parties have the opportunity to air their views as to all relevant matters at public meetings held under the Marketing Orders.]

This same analysis is equally applicable to the assessment regulations for prior years. (Ex. 5-C and the materials cited therein.) The challenge of Petitioners to the collection of assessments, therefore, has no legal basis. [This is reinforced by the fact that supplemental assessment rates can be issued if actual expenses or shipments change and the Act and the Orders require any such supplemental rates to be applied retroactively to all handlers on the same basis. Hence, it is clear that good cause exists for dispensing with notice and comment rulemaking.[16]]

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[16] The 1987 assessment regulation applicable to 10 Marketing Orders (including plums and nectarines) succinctly states the foregoing requirements of the Act and the Marketing Orders (52 Fed. Reg. 31,375 (1987)). Thus, it notes a substantial basis for the actions taken and the invocation of the good cause provision.

Petitioners are essentially arguing the desirability of spending Order money for advertising. But the Marketing Orders in question (7 C.F.R. §§ 916.45, 917.39) expressly authorize spending assessment monies for advertising. Since petitioners have not challenged the formal rulemaking records that determined the desirability of those Order provisions, they are barred from litigating the question of whether these particular Marketing Orders should contain such provisions. *In re Sequoia Orange Co.*, 41 Agric. Dec. 1511, 1521-23 (1982), *order transferring case*, No. 82-2510 (D.D.C. June 14, 1983), *aff'd*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983). Petitioners' argument regarding the desirability of advertising is not justiciable herein.

Petitioners contend that the Secretary's approval of the budget item for advertising is different from the approval of all other budgetary expense items since the determination as to whether to approve advertising is discretionary. But every item in the budget is discretionary. For example, the number of employees hired by the Committees, and their salaries, are entirely discretionary with the Secretary. It is entirely discretionary as to whether the Secretary permits the Committees to rent office space. The Secretary could, if he chose, require the Committees to work out of their homes (exchanging information through personal computers and Fax machines), and require them to rent a hotel conference room if personal meetings are needed. The Secretary could require the Committees' staff to use only Committee-owned cars on Committee business or, conversely, the Secretary could require them to use their own cars, with a mileage reimbursement. In short, every aspect of the budgetary process is discre-

tionary. That is why every aspect of the budgetary process requires the Secretary's approval. Expenses for advertising are no different, in this respect, from any other Committee expenses incurred in connection with the Marketing Order programs. No Secretarial approval of budget items requires notice-and-comment rulemaking.

Although the *approval* of the budget items is not subject to the Administrative Procedure Act, after the Secretary has approved the budget items (which, under the Agricultural Marketing Agreement Act, *requires* every handler to pay his *pro rata* share of the approved expenses), the Secretary publishes the actual assessment rate as a final rule, invoking the "good cause" exception to the Administrative Procedure Act (5 U.S.C. § 553(b)) for not engaging in notice-and-comment procedures. This is entirely appropriate since the law requires that the assessment conform with a ministerial calculation. In these circumstances, the cases cited by petitioners are inapposite to the situation here. At the time of the publication of the final rule setting forth the assessment rate, all discretionary budget determinations have previously been made, and the budgetary-approval process is not subject to the Administrative Procedure Act. Since the final rule announcing the assessment rate sets forth a statutorily-required ministerial calculation, good cause exists for dispensing with notice-and-comment rulemaking. As shown above, however, the Secretary has access to a large amount of data and recommendations with respect to all items of the budget, including the minutes of the public meetings at which the budget is discussed.

END OF EXCERPT FROM WILEMAN I

The tree fruit orders involved in *Wileman I*, quoted above, are analogous to the Almond Order involved here. The Nectarine Order provisions discussed in *Wileman I* are set forth below, followed immediately by the analogous provision of the Almond Order.

A. Section 916.3[1]: "The committee shall have . . . the following duties:

> (c) To submit to the Secretary as soon as practicable *after the beginning of each fiscal period* a budget . . ." (emphasis added).

Section 981.80 of the Almond Order provides: "The recommendation of the Board as to the expenses for each such year . . . shall be submitted to the Secretary *on or before August 1 of the crop year* . . . ." Because the crop year begins July 1, this is equivalent to "after the beginning of the crop year." In addition, § 981.81(a) states:

> At any time during or after a crop year, the Secretary may increase the rate of assessments to apply to all such almonds during such crop year to secure sufficient funds to cover the expenses authorized by § 981.80 or by any later finding by the Secretary relative to the expenses of the Board, and such additional assessments shall be paid to the Board by each handler on demand.

B. Section 916.40—"The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred . . . ."

Section 981.80 provides: "The Board is authorized to incur such expenses as the Secretary may find are reasonable and likely to be incurred . . . ."

C. Section 916.41(a)—"As his pro rata share of the expenses which the Secretary finds are reasonable and likely to be incurred by the committee during a fiscal period, each person who first handles nectarines during such period shall pay to the committee, upon demand, assessments on all nectarines so handled . . . . (b) The Secretary shall fix the rate of assessment to be paid by each such person during a fiscal period in an amount designed to secure sufficient funds to cover the expenses which may be incurred during such period and to accumulate and maintain a reserve fund equal to approximately one fiscal period's expenses."

Section 981.81 provides: "Each handler shall pay to the Board on demand by the Board, from time to time, such sum . . . based on such rate per pound of almonds . . . as the Secretary finds is necessary to provide funds to meet the authorized board expenses and the operating reserve requirements . . . ."

D. Section 916.45—"Such [production research, marketing research and development] projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916.41."

Section 981.41 provides: "The Board, with the approval of the Secretary, may establish . . . production research, marketing research and development projects, and marketing promotion including paid advertising . . . . The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) . . . ."

The Plum Order provisions relied on in *Wileman I* (7 C.F.R. Part 917) are also similar to the provisions of the Almond Order.

For the reasons set forth in *Wileman I*, the Secretary was not required to promulgate the assessment rates, including the creditable portion thereof, by notice-and-comment rulemaking.[21]

Even if the Secretary's failure to engage in notice-and-comment rulemaking with respect to the assessment rates for the 1980-81 through the 1986-87 crop years were error (which is not the case), the appropriate remedy would be to remand the matter to the Secretary, so that the Secretary could now engage in notice-and-comment rulemaking with respect to each crop year, and retrospectively establish the appropriate assessment rate for each year, upon the basis of the comments received (see § I, Additional Conclusions by the Judicial Officer, excerpt from *Wileman I*). It would be a drastic and unconscionable remedy to completely invalidate the assessment rates for 7 years, and hold that, as a result of the Secretary's failure to comply with the notice and comment provisions, handlers were not obligated to pay any assessments for those 7 years.

The expenses for those 7 years have already been incurred on the basis of the Order and the regulations. There is no ready source of funds to repay all the handlers who would be entitled to repayment, under a holding that the assessments were invalid,

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[21] Petitioners also contend that the notice period allowed by the Secretary to comment was too short for the 1987-88 and 1988-89 crops, but since no notice period is required, their contention is without merit. In any event, the 10- and 12-day comment periods were sufficient, given the facts that the assessment rate is merely determined by dividing the total approved expenses by the estimated production, and handlers knew long in advance of the comment periods what recommendations had been made by the Board.

with no opportunity to correct the mistake. The assessment rates for the 7 years produced approximately 72.3 million dollars (RX 94, 96, 103, 106, 110, 115, 119). If petitioners are entitled to a repayment of their assessments (or to be relieved from the obligation to pay any assessments not already paid), every other handler regulated by the Order may be entitled to the same relief. The Secretary would certainly have to consider whether he should voluntarily repay the assessments to all handlers for all or some of the years involved. There is no statute of limitations applicable to the filing of a § 8c(15)(A) proceeding by any almond handler regulated by the Order. Unless laches were held to be applicable to some of the earlier years (as to petitioners and other handlers), all other handlers could still file § 8c(15)(A) proceedings as to this same issue.[22] Even in the absence of such § 8c(15)(A) petitions, the Secretary would have to consider whether he should voluntarily reimburse all other handlers for all or some of the years.

If the Secretary were to determine that other handlers should be reimbursed for all or part of the assessment obligations during the 7 years, the only source of funds would be through an increase in the Board's budget for the year in which repayments are to be made. That is, handlers in the repayment year would pay an assessment rate that would provide funds not only for the current year but for the 7 years involved in this case. Instead of the typical assess-

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[22] In my view, laches should apply to any assessment obligation as to which a § 8c(15)(A) petition is not filed within 2 years after the Secretary's issuance of the assessment rule. *Cf.* 7 C.F.R. § 1000.6 (providing 2-year period for the termination of obligations under milk marketing orders).

ment rate of about 2.8¢ per pound, the assessment rate for the repayment year would be about eight times that amount, or 22.4¢ per pound (2.8 x 8 = 22.4). If all handlers in the repayment year handled the same proportionate part of the almond crop as they did during the 7 years involved here, each handler would merely be providing sufficient money to the Board to repay himself. Any handler whose proportionate part of the total crop was greater during the repayment year than during the 7 years involved here would pay more than he received as reimbursement. Any handler who received repayment for those 7 years who was no longer in business (and would, therefore, pay no part of the repayment-year's budget), or whose proportionate part of the almond crop in the repayment year was less than during those 7 years, would receive more than he paid to the Board.

The effect of increasing the repayment year's assessment rate to approximately 22.4¢ per pound would have to be carefully considered by the Secretary. Could this rate be passed on to producers, or to the buyers? If so, what would it do to producers or to the demand for almonds? If it could not be passed on, could the handlers afford to pay such an assessment rate, even though most, if not all, of the handlers, would be getting a substantial part of it back from the Board? Until the possibility of an extraordinary expense budget to repay handlers' assessment monies is ended, will handlers be able to sell their businesses to others? Could the Secretary now lawfully establish a statute of limitations, that would cut off the existing rights of handlers who paid assessment obligations during the period involved here, without giving them a reasonable opportunity to file a § 8c(15)(A) proceeding?

The difficulties that would be presented, if the failure to engage in notice-and- comment rulemaking required complete invalidation of the assessment rates for the 7 years in question, strongly support the remedy of permitting the Secretary to correct his error by retrospective rulemaking, through engaging in notice-and-comment rulemaking as to these 7 years at this time, and issuing the retrospective assessment rates that he would have issued, based on all of the knowledge gained through the notice-and-comment rulemaking proceedings.

Another reason supporting the retrospective rulemaking approach is the fact that the failure to engage in notice-and-comment rulemaking, if it were required by the APA, is a technicality that is not likely to produce any new information not known to the Secretary through the public-meeting approach and Committee-and-Board-meeting approach now followed under the program. The regulated industry is relatively small (there are just over 100 handlers) and highly knowledgeable as to the public meetings and other means that are employed to acquaint the Secretary with all of the facts influencing his ultimate decisions. The same things happen each year at about the same time, and they are widely publicized in industry circles. Furthermore, the assessment rate does not change drastically from year to year, absent some significant program change. For example, in the 7 years involved here, the assessment rates were 2.8¢, 2.85¢, 2.85¢, 2.85¢, 2.78¢, 2.7¢, and 2.6¢, all "less any amount credited pursuant to § 981.41 but not to exceed 2.5¢ per pound." (The creditable assessment figure of 2.5¢ per pound did not change at all during the 7 years.) Considering all of the information available to the Secretary from industry meetings and

Board and Committee recommendations, it is not realistic to believe that the Secretary would have changed the assessment rate, including the creditable portion thereof, if notice-and-comment rulemaking had been engaged in. But if it is held that the Secretary's failure to engage in notice-and-comment rulemaking was fatal error, the only reasonable remedy is to remand the proceeding so that the Secretary can retrospectively issue the appropriate assessment rates for those 7 years based upon the knowledge derived from the new notice-and-comment rulemaking. If a reviewing court should disagree with this view, consideration should also be given as to whether any reimbursement is just and reasonable, considering all of the facts and circumstances (see the quotation from *Wileman I*, set forth in § I of the Additional Conclusions by the Judicial Officer).

VI. The Rules Imposing the Assessment Rates From 1980-81 Through 1988-89, Each of Which Was Issued after the Handling of Almonds Had Begun for the Crop Year, Were Not Invalid Retroactive Regulations.

The ALJ held that the rules imposing the assessment rates from 1980-81 through 1988-89, issued after the handling of almonds had begun for each crop year, were retroactive in effect and therefore invalid. The ALJ concluded (Initial Decision at 74-82):

Respondent explains in its brief that the Order provides that the Board will submit its budget of expenses for the crop year starting on July 1, to the Secretary by August 1. 7 C.F.R. § 981.80 (1989). This timetable is necessary in order to permit crop estimates which are done in July. The Secretary needs time to review the budget and as a result "the

assessment regulation will normally be enacted with a retroactive effective date." (Respondent's Brief, p. 77) As a result of this statement by Respondent, in a Post-Hearing Order, I requested the parties to respond to the following question:

> 3. In *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-5 and 981-6, Chief Administrative Law Judge, Victor W. Palmer, decided that a rulemaking action of the Secretary was not in accordance with law since it was retroactive. Judge Palmer, quoting Supreme Court Justice Kennedy in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S.Ct. 468 (1988), explained that retroactive rulemaking is invalid without an express statutory grant and that "there is no express provision for retroactive rulemaking in the Agricultural Marketing Agreement Act." Should the decision in *In re Cal-Almond, Inc.* be applied to the assessment regulations discussed by Respondent at page 77 of his brief in this case? Please discuss.

In *Cal-Almond*, Judge Palmer, held that the Secretary's rulemaking action requiring handlers to hold in reserve 25% of the almonds handled during the 1988-89 crop year was not in accordance with law because it was retroactive. *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-5 and 981-6, March 19, 1990. The final rule was published on January 25, 1989, and applied to all almonds received by handlers from July 1, 1988, to June 30, 1989. Judge Palmer relied on the Supreme Court's decision in *Bowen*, that retroactive rulemaking is invalid without an express statutory grant:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result . . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms . . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

Bowen, 109 S.Ct. at 471 (citations omitted). Judge Palmer found that there was no express grant in the AMA providing for retroactive rulemaking. Judge Palmer also noted that the respondent's argument that the petitioners had conducted their operations as if a reserve would be required was irrelevant, as this was not a factor for determining whether a rule was improperly retroactive, under *Bowen*.

Petitioners adopted Judge Palmer's reasoning in their Response to the Post-Hearing Order. Petitioners explain that in each crop year from 1980 through 1989, the Board recommended the budget and assessment rates in their July meeting, shortly after the crop year had begun, but before the handlers received almonds for that crop year. However, the Secretary did not always issue the rule before the handlers received almonds. In 1980, the Secretary issued a final rule, without issuing a proposed rule, on August 26, 1980. (RX 94) In 1981, the Secretary issued a final rule, without issuing a proposed rule, on September 24, 1981. (RX 96) In 1982, the Secretary

issued a final rule, without issuing a proposed rule, on October 19, 1982. (RX 103) In 1983, the Secretary issued a final rule, without issuing a proposed rule, on October 5, 1983. (RX 106) In 1984, the Secretary issued a final rule, without issuing a proposed rule, on September 27, 1984. (RX 110) In 1985, the Secretary issued a final rule, without issuing a proposed rule on September 9, 1985. (RX 115) In 1986, the Secretary issued a final rule, without issuing a proposed rule, on October 17, 1986. (RX 119) In 1987, the Secretary issued a proposed rule on July 28, 1987, and issued the final rule on December 1, 1987, authorizing the 2.5 cents per pound credit. (RX 125, 126) The Secretary did not approve the budget and assessment rate until a proposed rule was issued on January 7, 1988, and a final rule was issued on April 14, 1988. (RX 132, 133) For the 1988 crop year, the Secretary issued a proposed rule on September 16, 1988, and a final rule on October 31, 1988. (RX 136, 137)

Petitioners contend that the Secretary had sufficient time to review the budget and assessment rates and issue a rule prior to the handling of almonds in a crop year. The handling of almonds commences in September. Petitioners argue that the Secretary intended that regulations affecting almond crops be in place before handlers began receiving the crop. In fact, as Judge Palmer discussed in *Cal-Almond*, the Secretary had selected July 1 as the beginning date for the crop years to allow ample time for consideration of Board recommendations before the actual handling of almonds commenced for the crop year. The Secretary explained in the Recommended Decision:

> The term "crop year" should be defined to mean the 12 months from July 1 through June 30. The harvesting of almonds begins in August, and sales or deliveries of almonds to handlers by growers may begin as early as September. Sales continue into the next calendar year, and usually reach their lowest level in July. It is desirable to have the crop year begin a sufficient time prior to the beginning of harvest to permit the preparation and issuance of appropriate regulations to govern the handling of the coming crop, and it is concluded that July 1 would be a proper beginning date from this standpoint.

15 Fed. Reg. 3623, 3628 (1950).

Petitioners argue that the Secretary has never justified why it takes so long to issue the rule, nor has he ever justified applying it retroactively. Petitioners assert that the Secretary had sufficient time to issue a proposed rule, with a shortened comment period, and a final rule before the handlers received the crop. In the alternative, the Secretary could have issued an interim final rule approving the assessment rate, and later issued a final rule. The effect of the retroactive rules were to apply the assessment rate upon almonds received by handlers prior to the Secretary actually imposing the rate of the assessments. Petitioners contend that the assessments should not apply with respect to almonds received by them before the Secretary issued a final rule for each of the crop years in question.

Respondent argues that the decision in *Cal-Almond* is incorrect with regard to the assessment regulations and should not be applied in this case. The decision in *Cal-Almond* considered the wrong

rule. The rule authorizing the reserve was the proper rule to be reviewed and not the rule setting the reserve amount. The rule authorizing the reserve created the legal obligation to withhold a reserve, while the rule setting the amount did merely that, set the amount.

Respondent argues that in the present case, the rule in question is the rule requiring the handler to pay assessments, 7 C.F.R. § 981.81 (1989), not the annual rule approving the Board's budget and setting the assessment rate, that creates the obligation. The annual rule merely authorizes the expenditures by the Board. Since section 981.81 was properly promulgated, and is prospective in its application, there is no retroactivity problem.

Respondent explains that the Supreme Court disfavored the retroactive effect of the rule in *Bowen* because it resulted in an "unreasonably harsh action." *Bowen*, 109 S.Ct. at 471 (quoting *Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928)). Respondent asserts that the application of the assessment rate to almonds handled prior to the promulgation of the rate, was not harsh. Respondent argues that handlers knew each year in February what the Board's tentative proposed assessment rate would be. Further, there was no evidence that the handlers would have altered their activities with regard to the assessment rates. There was prior notice of the formula for calculating the assessment rate, as provided in the Order. The estimated crop is divided into the approved budget and applied to the almonds handled during the crop year.

Respondent argues that Justice Scalia's concurrence supports its position that the assessment rule is valid. Justice Scalia discussed the APA at length.

He noted that under the APA, rules which must be prospective are "primarily concerned with policy considerations." *Bowen*, 109 S.Ct. at 477. The policy of assessments is implemented by section 981.81 and is prospective, although it has an affect on past transactions, *i.e.*, the almonds handled the first few months of the crop year. Justice Scalia notes that this effect on past transactions is permissible, provided it is not a change in past law. *Id.* at 477-78.

Respondent argues that if the rule is found to be retroactive, it is not invalid, as the AMAA provides for retroactive rulemaking. The AMAA provides that each order:

> [S]hall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, *during any period specified by him* . . . .

7 U.S.C. § 610(b)(2)(ii) (1988).

I find that the rules imposing the assessment rate, that were promulgated after the handling of almonds had begun for that crop year, were retroactive in effect and therefore invalid.

Respondent contends that the regulation at issue is section 981.81. Section 981.81 provides in relevant part:

> (a) Requirement for payment. Each handler shall pay to the Board *on demand by the Board*, from time to time, such sum less any amounts credited pursuant to § 981.41, based on such rate per pound of almonds, kernel weight basis, received by him for his own account (except as to

> receipts from other handlers on which assessments have been paid) *as the Secretary finds is necessary* to provide funds to meet authorized board expenses and the operating reserve requirement, and *establishes for the crop year* . . . .

7 C.F.R. § 981.81(a) (1989) (emphasis added). Section 981.81 does not compel the handler to pay an assessment until the Secretary directs the handler to pay. Section 981.81 clearly authorizes the Secretary to impose an assessment. However, the legal obligation to pay is not imposed until the Secretary directs that an assessment is necessary for the crop year and determines the amount of the assessment.

Justice Scalia concluded that the APA clearly requires prospective rulemaking. Section 551(4) of the APA requires a rule to have a "future effect" and further provides for the "approval or prescription *for the future* of rates . . . ." *Bowen* 109 S.Ct. at 475-80; 5 U.S.C. § 551(4) (1988) (emphasis added). Justice Scalia stated:

> It seems to me clear that the phrase "for the future"—which even more obviously refers to future operation rather than a future effective date—is not meant to add a requirement to those contained in the earlier part of the definition, but rather to repeat, in a more particularized context, the prior requirement "of future effect."

Id. at 476. Therefore, unless the AMAA provides for retroactive rulemaking, the Secretary has no authority to issue rules retroactively.

Section 10(b)(2)(ii) of the AMAA does not permit retroactive rulemaking, but in fact uses prospective language. Section 10(b)(2)(ii) states that handlers may be assessed pro rata for expenses, that the Secretary

may "determine to be appropriate" and "are likely to be incurred" by the Board. 7 U.S.C. § 610(b)(2)(ii) (1988). The phrase "during any period specified by him" in no way suggests that Congress intended the AMAA to authorize retroactive rulemaking. The phrase seems to imply that the Secretary may determine the length of time for which a budget will apply, where the Secretary has determined the expenses likely to be incurred by the Board. In the Order, the Secretary has decided that a budget will apply from July 1 to June 30 of each crop year. As the Court explained in *Bowen*, the authorizing statute must specifically provide for retroactive rulemaking. Express language allowing retroactive rulemaking is needed.

Petitioners explain that if Respondent's argument that the Secretary can impose the assessment rate at any time is carried to its logical extreme, then the Secretary could wait until the end of the year and impose an assessment rate, or wait a year, two years, and impose a rate for all of the previous years making it retroactive and compelling handlers to pay the assessment. The APA and the Court in *Bowen*, make this assertion invalid.

Respondent's argument that the handlers were on notice as early as the February proceeding the crop year as to what the recommended assessment rate would be is rejected. Notice is not relevant. *Bowen*, 109 S.Ct. at 475. Respondent makes the process sound automatic that the Board determines the assessment rate, and the Secretary then imposes the rate. This is not the case. The Board is to determine its budget and make a recommendation to the Secretary of the assessment rate, based on the estimated expenditures of the Board. The Secretary is then supposed to re-

view this material and approve or disapprove as he determines is necessary. Thus, the assessment rate could be changed, or the Secretary could even decide not to impose an assessment rate. Handlers should not have to start a crop year under the assumption that an assessment might be imposed, but are entitled to notice that an assessment will be imposed. The Secretary could accomplish this by interim rulemaking, or by providing for a shortened notice and comment period to allow for promulgation of the rule prior to the handling of almonds.

Respondent mischaracterizes Justice Scalia's discussion of "secondary" retroactivity. Justice Scalia states:

> A rule with exclusively future effect (taxation of future trust income) can unquestionably *affect* past transactions (rendering the previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA.

Bowen, 109 S.Ct. at 477. In *Bowen*, the Secretary of Health and Human Services changed the law retroactively while a prior rule was in effect. This is not permitted by the APA. *Id.*

> Here the rule at issue is the rule establishing the assessments, which is enacted annually. There is no rule in effect until the adoption of the rule establishing the assessment for that crop year, and as a result the promulgation of that rule changes the law. It imposes an assessment where there was none. This is precisely the situation prohibited by the APA.

The assessment rates established each year relevant here, and the creditable portion thereof, are set forth in the following table (RX 94, 96, 103, 106, 110, 115, 119, 126, 133, 137):

Assessment Rates and Creditable Portion Thereof

Crop Year	Assessment Rate	Creditable Portion
	Cents Per Pound	Cents Per Pound
1980-81	2.8	2.5
1981-82	2.85	2.5
1982-83	2.85	2.5
1983-84	2.85	2.5
1984-85	2.78	2.5
1985-86	2.7	2.5
1986-87	2.6	2.5
1987-88	2.8	2.5
1988-89	2.65	2.5

No one who has any in-depth familiarity with the Almond Marketing Order Program would deny the fact that petitioners have no real interest in the retroactivity issue, except insofar as they hope to avoid their assessment obligations because of what they regard as fatal error. As a practical matter, it makes no difference whatever to petitioners whether they know the exact assessment rate and creditable portion thereof before they actually receive almonds in a marketing year. The assessment rate and creditable portion do not change materially from year to year. In fact, the creditable portion has been exactly 2.5¢ per pound from 198081 (and at least for the year before that), until the present. The assessment rate has not varied by more than a quarter of a cent per pound during those years. There are only slightly over 100 handlers regulated by the Order, and those

handlers are well aware of the fact that an assessment will be in effect each year, unless the program is terminated, and they are well aware of the Board's recommendation as to the assessment rate, including the creditable portion thereof, made in about February of each year. Whether the Secretary later changes the Board's recommendation by a tenth of a cent, or so, would have no effect whatever on a handler's business decisions. Even if the Secretary's determination was a cent or two different from the Board's recommendation (which would never be expected to happen, in practice), that would not affect a handler's business decisions. (The rate is the same for all of a handler's competitors, and the total assessment is so small compared to the value of the almonds that a handler would not change his personal production or his handling for others because of the assessment rate.) Accordingly, this issue should be seen as it actually is—an attempt by petitioners to find some legal technicality to relieve them from all assessment obligations during this period.

It is significant that although petitioners' Amended Petition alleges a multitude of reasons why the assessment rate regulations (including the creditable portion thereof) are unlawful, petitioners do not allege retroactivity as one of the grounds. In addition, in The Parties' Joint Submission of Issues to be Decided, filed March 29, 1989, the retroactivity issue was not raised. Hence "retroactivity" is a legal afterthought, having no real effect on petitioners.

Furthermore, petitioners' failure to raise the retroactivity issue in their Amended Petition precludes us from considering the matter in this § 8c(15)(A) proceeding. As stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, slip op. at 52-53 (Apr. 12, 1990),

appeal docketed, No. CIV-90-688 T (W.D. Okla. May 1, 1990):

> In addition to disagreeing with the ALJ on the merits of the Notice of Hearing issue, I disagree with the ALJ on procedural grounds. That is, I believe that it was inappropriate for the ALJ to hold that the Notice of Hearing (and therefore the amendatory order) was invalid on the basis of a sentence in the Notice of Hearing not relied upon by the petitioner. It should be noted that this is not the typical proceeding brought before the ALJs whereby the Department is the complainant, and the ALJ might appropriately note *sua sponte* a ground of *defense* not noticed by the respondent's counsel. Rather, a § 8c(15)(A) proceeding is instituted by a private party, who is responsible for framing the issues. Under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)), only a handler may file "a written petition" challenging an order, or any provision thereof, after which the handler shall be given opportunity for a hearing "upon such petition, in accordance with regulations made by the Secretary," and with a ruling made "upon the prayer of such petition . . . ." Neither the statute nor the Rules of Practice authorize an ALJ or the Judicial Officer to challenge an order or a provision thereof upon a basis not raised by the handler [in the petition]. The Rules of Practice require the petition to specifically state the "grounds" for the challenge (7 C.F.R. § 900.52(b)(4)), limit the evidentiary record to matters relevant and material to those grounds (7 C.F.R. § 900.60(d)), and require the ALJ to base his decision on that record (7 C.F.R. § 900.64(c)).

> Even though the petitioner contested the adequacy of the Notice of Hearing in its petition, petitioner did not rely on the ground relied upon by the ALJ in holding that the Notice of Hearing was inadequate. Accordingly, I believe that it was error for the ALJ to raise *sua sponte* the issue as to whether the sentence limiting the receipt of evidence "to the economic and marketing conditions which relate to the location adjustment provisions of the proposed merged and expanded Southwest Plains marketing area" precluded the receipt of evidence on the issue as to whether Lincoln County should be placed in Zone I.

Since Congress gave the Secretary jurisdiction only to rule "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A)), neither the ALJ nor the Judicial Officer has jurisdiction to rule upon an issue not raised in the Petition or Amended Petition.

But even if the retroactivity issue can be considered, in the excerpt from *Wileman I*, quoted in § V of the Additional Conclusions by the Judicial Officer, the explanation supports the view that there is no invalid retroactivity involved here (even though retroactivity is not directly raised in *Wileman I*). In addition, it is explained in § V of the Additional Conclusions by the Judicial Officer that the Almond Order clearly authorizes the issuance of retroactive assessment regulations. Those Order provisions were issued on the basis of a formal rulemaking record, and there is no challenge as to the evidentiary support for those provisions. In addition, I am in agreement with the views set forth in Respondent's Reply to Judge Bernstein's Post-Hearing Order at 2-8, insofar as they relate to the issue involved here

(leaving aside any determination as to whether those views are also correct with respect to the issue now pending on appeal in *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-6), which are as follows:

3. In *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-6, Chief Administrative Law Judge, Victor W. Palmer, decided that a rulemaking action of the Secretary was not in accordance with law since it was retroactive. Judge Palmer, quoting Supreme Court Justice Kennedy in *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468 (1988), explained that retroactive rulemaking is invalid without an express statutory grant and that "there is no express provision for retroactive rulemaking in the Agricultural Marketing Agreement Act." Should the decision in *In re Cal-Almond, Inc.* be applied to the assessment regulations discussed by Respondent at page 77 of his brief in this case? Please discuss. [This is the ALJ's issue discussed below by respondent.]

The decision in *Cal-Almond* is wrong with regard to assessment regulations and thus should not be applied to this case.[1] The following points, which are discussed more fully hereafter, explain why this is so. The assessment rule is *not* retroactive. Furthermore, dless of how the rule is characterized, the decision in *Georgetown Univ. Hosp.* does not apply to the situation of the AMAA and the marketing orders thereunder. Finally, even if the rule were held to be retroactive and the *Georgetown Univ. Hosp.* case were found to apply, the Secretary's rule is valid as it is authorized by the statute.

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[1] The respondent in *Cal-Almond* is currently appealing the decision in that case to the Judicial Officer.

The crucial flaw in the *Cal-Almond* decision is that it looks at the wrong rule. The rule in question is section 81 of the Almond Marketing Order (7 C.F.R. 981.81). That rule is prospective only. It is that rule that imposes a legal obligation on a handler, requiring a handler to pay assessments. The annual rule approving the Board's budget and setting out the assessment rate does not create the obligation. A review of the *Georgetown Univ. Hosp.* (hereinafter *G. U. Hosp.*) case demonstrates that the marketing order provision, i.e., section 81, is the equivalent to the rule the Supreme Court was discussing with regard to the Secretary of HEW.

In that case, the Secretary of HEW had promulgated a rule changing a *procedure* for determining the amount of reimbursement a hospital would receive under certain Medicare provisions. The change involved the so-called wage-index rule and held that wages paid by Federal Government hospitals would be excluded from the computation. After the District Court held the change to the rule invalid (for failing to provide notice and comment),[2] the Secretary of HEW sought to repromulgate the change with notice and an opportunity to comment and to have the change apply retroactively to the time when it would have begun had it not been ruled invalid. (*G. U. Hosp.*, *supra*, at 470-71). In our case, the Secretary properly promulgated section 81 which establishes the procedure for assessments and then applied it only prospectively. In addition, unlike the medicare case,

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[2] The Secretary of Agriculture not only provided notice with regard to the promulgation of 7 C.F.R. 981.81, but issued that rule only after a formal APA on-the-record hearing at which all interested persons could comment and participate.

there was no change to an existing rule, only an arithmetic implementation of that rule.

The following hypothetical concerning the almond order will demonstrate the situation with which the Court in the *G. U. Hosp.* case was concerned, contrasting it with the situation in *Saulsbury*. Section 441(c)(4)(ii) of the Order (7 C.F.R. 981.441(c)(4)(ii)), provides that a handler may receive credit for advertising in certain specified foreign countries. Assume the Secretary amends that rule by deleting West Germany from the list of approved countries as of July 1, 1990, (as the Secretary of HEW amended her wage index rule to delete Federal hospitals). One year later, Handler Doe brings a proceeding under section 15 of the AMAA (7 U.S.C. 608c(15)), challenging the deletion and the Board's refusal to give him credit for expenditures in West Germany during the 1990-91 crop year. A court issues a final order holding that the rule deleting West Germany was not in accordance with law as it lacked adequate support in the record (as the Court in *District of Columbia Hospital Ass'n v. Heckler*, No. 82-2520, cited in *G. U. Hosp., supra*, at 470, held with regard to the Secretary of HEW's change to her wage index rule). Assume the Board then pays back to Doe the amount of credit he would have received for his expenditures in West Germany. The Secretary, in 1991, then repromulgates the deletion of West Germany and directs that it be effective retroactively to July 1, 1990. He then seeks to force Doe to repay to the Board the amounts he spent in West Germany in 1990 which are retroactively not creditable (again, this is just what happened in *G. U. Hosp.*). Such a rule would be impermissible, but is inapposite to the situation in *Saulsbury*.

In *Saulsbury*, the Secretary properly promulgated 7 C.F.R. 981.81 well before applying it to any almonds. *Subsequently*, handlers were required, by section 81, to pay assessments on all almonds handled (based on the rate established by the yearly budget). There was no change in procedure or impact. Moreover, no handler altered, nor is there any assertion that any handler would have altered, his activities as a function of the assessment rate. In fact, the handlers knew each year in February what the Board's tentative proposed assessment rate was to be. (The Judicial Officer has held that the Secretary should give great weight to the recommendations of the industry groups involved in the implementation of marketing orders, *In re Sequoia Orange Co., Inc.*, 4[7] Agric. Dec. [2, 186] (1988) [, *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989)].)

A further analysis of the *G. U. Hosp.* decision reveals many other instances which prove that the Court's decision applies to a rule such as section 81 (7 C.F.R. 981.81) and not the rule approving the Board's budget and establishing a corresponding assessment rate. Justice Kennedy cites *Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928) for the proposition that the reason that retroactive rules are disfavored is to prevent "unreasonably harsh action" [109 S. Ct. at 471]. Nothing about the application of the assessment rate to almonds handled in the period before the precise rate is announced is harsh. Handlers know that there will be an assessment pursuant to 7 C.F.R. 981.81. They know approximately what the rate will be as a result of the tentative rate listed by the Board in February. Furthermore, the Court

relied on legislative history that indicated that providers should know in advance the basis or *procedure* for establishing the rate of reimbursement (although not the actual amount). That is precisely what is accomplished by the Almond Order where an almond handler knows the procedure and basis for his assessment. The mathematical calculation of dividing the estimated crop into the approved budget and applying it to all almonds handled during the crop year is the only step remaining. Thus the assessment rule complies with another factor with which the Court felt a rule must comply, it provides notice of the procedure to be followed to the affected parties.

Justice Scalia's concurrence also argues for the validity of the assessment rule. In addition to the factors above, Justice Scalia discusses the APA and the government's own interpretation of it at length. He notes that under the APA, rules which must be prospective are "primarily concerned with policy considerations" (*G. U. Hosp., supra*, at 477). The policy of assessments is implemented by 7 C.F.R. 981.81 and is prospective, although, via the annual budget and assessment rate rule, it has an affect on past transactions, *i.e.*, the almonds handled the first few months of the crop year. Justice Scalia notes that this effect on past transactions is permissible, provided it is not a change in the past law (*G. U. Hosp., supra*, at 477-78).[3]

Another factor that demonstrates that the approval of the budget and the establishment of the assessment rate is not retroactive and, in any event, not prohibited, is the fact of who is affected. It is 7 C.F.R. 981.81 that obligates handlers to pay an assessment, the

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[3] It is this effect on past transactions to which respondent was referring on p. 77 of its Brief.

subsequent budget and resulting assessment rate is actually to authorize expenditures by the *Board*.

Finally, even if the rule is found to be retroactive, and if the holding in *G. U. Hosp.* is found to apply, the rule is nevertheless permissible as any retroactivity is specifically authorized by the authorizing statute, the AMAA. The AMAA provides that each order "*shall* provide that each handler subject thereto shall pay to [the Board] such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by [the Board], *during any period specified by him* . . .["] (emphasis added) 7 U.S.C. 610 (b)(2)(ii). Pursuant to this authority the Secretary, in Order 981, has established the crop year as the specified period. As petitioners themselves note (Tr. 321), the Board and the Secretary must have a reasonable estimate of the crop to permit the procedure to operate. That can not happen until mid-July at the earliest which is *after* the start of the crop year established by the Secretary pursuant to the authority provided to him by the AMAA to specify the applicable period. Thus the Secretary has ruled that assessments shall be on *all almonds* received by a handler during a crop year (7 C.F.R. 981.81) and the rate must be based on an estimate which can not occur horticulturally until after the crop year has begun and will, by prospective rule 7 C.F.R. 981.81, apply to all almonds handled during the crop year.

In addition, after considering petitioners' argument as to retroactivity, it is no longer my view that the assessment rate must be included in a *regulation*. In *Wileman I*, quoted above in § V, I adopt the view of the ALJ in that case that, even though the approval of the budget by the Secretary does not have to be

accomplished by rulemaking, the levy of an assessment must be done by means of a regulation. However, there is nothing in the Agricultural Marketing Agreement Act of 1937 that requires that a handler's assessment obligations be set forth in a regulation (see 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii-(iii)). Since the Order, published in the Federal Register after a formal rulemaking hearing, expressly requires handlers to pay their pro rata share of expenses approved by the Secretary, and expressly authorizes retroactive assessment determinations (7 C.F.R. §§ 981.80, .81), it is my present view that the Secretary could notify handlers by personal notice or otherwise of their assessment obligations, without issuing a regulation.

If the rules imposing the assessment rates from 1980-81 through 1988-89 were invalid because of retroactivity (which is not the case), this could not be cured by any new rulemaking procedure, but consideration would still have to be given as to whether reimbursement is just and reasonable considering all of the circumstances, whether laches would preclude recovery for some of the years, and whether all handlers should voluntarily be reimbursed by the Secretary (see § V, Additional Conclusions by the Judicial Officer).

VII. There Is No Merit to Petitioners' Appeal.

Petitioners appeal all of the issues decided adversely to them by the ALJ, except the ALJ's rejection of their third argument under the ALJ's § V (holding that § 981.441 of the Order did not have to be promulgated through formal rulemaking rather than informal rulemaking). Petitioners' appeal is, in the main, a rehash of the arguments fully briefed before the ALJ and fully briefed in respondent's responses

before the ALJ. In my view, the ALJ correctly decided those issues, and no useful purpose would be served by further discussion here. Briefly, however, it should be noted that petitioners repeatedly argue that when the cooperative bloc-votes against a minority recommendation, the Secretary never gets a chance to consider the minority view. That is not true. Minority views in minutes or elsewhere are transmitted to the Secretary (Tr. 436; see, e.g., RX 87, at 45, reporting the Board's 91 vote, and discussing the dissenting view of the single dissenter (Cloyd Angle, President of Petitioner Cal-Almond, Inc.); PX 62, at 6 (top ¶); PX 63, at 58-60).

For the foregoing reasons, the following order should be issued.

Order

The relief requested by petitioners is denied and the amended petition is dismissed.

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APPENDIX J

UNITED STATES DEPARTMENT OF AGRICULTURE

No. 89 AMA Docket No. F&V 981-7

IN RE: CAL-ALMOND, INC.

[Decision and Order Filed Feb. 28, 1991]

By: DONALD A. CAMPBELL, Judicial Officer

This is a proceeding instituted by a petition filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Order Regulating the Handling of Almonds Grown in California (7 C.F.R. Part 981).*

On June 28, 1990, Administrative Law Judge James W. Hunt (ALJ) filed an initial Decision and Order holding against petitioner on all issues except one. As to the issue decided in petitioner's favor, the ALJ held that § 981.441(c)(2) of the Secretary's regulations (7 C.F.R. § 981.441(c)(2)) conflicts with § 8c(10) of the Act (7 U.S.C. § 608c(10)).

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* See generally Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, §§ 2.01-.15, 2.46-.58 (1981 and 1989 Cum. Supp.).

On August 16, 1990, petitioner appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35),** as to the issues decided adversely to the petitioner. On September 24, 1990, respondent appealed as to the issue decided adversely to the Department. On December 11, 1990, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, I agree with respondent's appeal and find no merit in petitioner's contentions. Accordingly, I am dismissing the petition. I am adopting those portions of the ALJ's initial decision set forth below, with a few trivial changes, and with additions included within brackets, and omissions indicated by dots. Additional conclusions by the Judicial Officer follow the ALJ's initial decision.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This proceeding presents the issue whether the advertising credit provision in the Marketing Order

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** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

for Almonds Grown in California is in accordance with law.

The proceeding was instituted by a petition filed pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act ("AMAA") of 1937, as amended, 7 U.S.C. § 608c(15)(A). Petitioner is an almond handler.

A hearing was held in Fresno, California, on January 25 and 26, 1990. Petitioner was represented by Brian C. Leighton, Esq. Respondent, the Agricultural Marketing Service, was represented by Carol C. Priest, Esq. Post-hearing briefs were filed by both parties.

Facts

The Marketing Order for Almonds Grown in California ("Order") requires, among other things, that almond handlers pay an annual assessment as part of a program to promote the sale and consumption of almonds. However, a handler, by conforming to certain requirements, can reduce his assessment by having the cost of his direct advertising expenditures credited toward his assessment. Petitioner, an independent California almond handler, brings this action because two applications for advertising credit he submitted in 1989 were denied.

The Almond Order (7 C.F.R. § 981 *et seq.*) was promulgated through formal rulemaking proceedings by the Secretary of Agriculture pursuant to the AMAA (7 U.S.C. § 608c(3)). The purpose of marketing orders is to regulate the handling of various agricultural

commodities, including almonds.[1] The AMAA in § 608c(6)(I) states that a marketing order may include provisions relating to product promotion, advertising, assessments, and credits that can be applied toward assessments.

> In the case of the agricultural commodities and the products thereof, other than milk and its products . . . orders issued pursuant to this section shall contain one or more of the following terms and conditions . . .:
>
> (I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: Provided, That with respect to orders applicable to almonds [and 24 other named agricultural commodities] such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds . . . may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . .

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[1] The AMAA, a depression-era law, provides for marketing orders on the theory that they will stabilize prices paid to farmers and provide for an orderly marketing system. Agricultural Law § 2.01 *Federal Marketing Order Programs* (1981).

The AMAA further provides in section 608c(10), with respect to advertising, that:

> No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

The AMAA goes on to give the Secretary the authority to establish agencies to assist it in administering marketing orders, which agencies shall have the authority, among other things, to make rules and regulations to effectuate the terms and provisions of an order.

The Almond Order issued by the Secretary provides for the creation of a ten-member Almond Board of California ("Board") composed of industry representatives to assist in administering the Order. The Secretary selects the persons to serve on the Board. A majority vote is required for most Board decisions, but seven affirmative votes are required for a Board decision recommending projects to the Secretary involving marketing, promotions, advertising, assessments, and advertising credits.

The Order states in § 981.41 that the purpose of such projects is to "assist, improve, or promote the marketing, distribution, consumption, or efficient production of almonds." The Order outlines the procedure the Board, with the Secretary's approval, is to follow when engaging in such activities and in section 981.41(e) further provides that:

> Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

The Secretary has adopted such rules and regulations in 7 C.F.R. § 981.401 *et seq.*[2] Section 981.441(c)(2) of these regulations (the section principally under challenge in this proceeding) provides that:

> The clear and evident purpose of each advertisement shall be to promote the sale, consumption, or use of California almonds, and nothing therein shall detract from this purpose.

The Almond Board has created a Public Relations and Advertising Committee ("Committee") to promote almonds. The Committee makes annual recommendations to the Board concerning promotional activities, its budget, and the assessments to be levied on handlers. The Board then makes its recommendations on these matters to the Secretary. Money paid to the Board by handlers in lieu of receiving credit for their advertisements is used by the Board to defray its costs for the coming year. The committee does promotional work but engages in no advertising.

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[2] These regulations were adopted through informal rulemaking procedures. The AMAA in § 608c(3) only requires that the Order itself be adopted through formal rulemaking proceedings.

When a handler wants credit to be applied toward his assessment for the advertising he conducts, he submits an application, together with supporting documentation, to the Board. The Board's staff reviews the application and makes an initial determination whether the handler should receive credit.

Peggy Leong, the staff manager, testified that one of the first things the staff checks is whether the advertisement meets the requirement of § 981.441(c)(2), that is, whether the clear and evident purpose of the advertisement is to promote the sale, consumption, or use of almonds and whether anything in the advertisement detracts from that purpose.

Leong said that most advertising is approved, but that if the staff recommends disapproval the handler may appeal to the Committee and then to the Board. A USDA representative attends Board meetings, but does not participate in or vote on decisions concerning credit applications. However, Martin Engler, an employee of USDA's Agricultural Marketing Service, who attends Board meetings, testified that a handler can ask the Secretary (i.e., Agricultural Marketing Service) to review decisions by the Board concerning advertising credits. This review procedure, however, has not been incorporated into the Secretary's regulations. In the instant case, two applications for advertising credit submitted by petitioner in 1989 were denied credit by the staff and Board (petitioner's exhibits A and B).

Leong testified that the first of these two advertisements, which ran in a local newspaper, was self-promotional and directed at growers rather than at consumers, while the second advertisement, which was to run in the *Wall Street Journal*, included peti-

tioner's comments about his objections to provisions in the Order on assessments and almond reserves. Leong said that the effect of these comments was "to carry [petitioner's] fight against the marketing Order to the public." (Tr. 86.)[3]

Therefore, Leong said, the two advertisements—being directed at growers rather than consumers and containing attacks on the Order—were not creditable because they did not meet the requirements of § 918.441(c)(2) of the Secretary's regulations, that is, the clear and evident purpose of the advertisements was not to promote the sale, use or consumption of almonds and that material in the advertisements also detracted from this purpose.

Petitioner has not filed an appeal of the Board's decision to the Secretary.

Argument

Petitioner, who has the burden of proving that the challenged provision in the Order is not "in accordance with law," contends that the provision in the Order and regulations allowing the Board to deny advertising credits to petitioner is unlawful as not in accordance with law on the grounds that:

1. The provision is an unconstitutional delegation of power by the Secretary to the Board.

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[3] In his brief (p. 39), petitioner states that he "vehemently disagrees with the advertising provisions of the Almond Marketing Order and believes that the assessments are a penalty imposed on independent handlers and imposed by the large competitor, Blue Diamond." The assessment rate in 1989 was 2.5 cents a pound. Petitioner estimated that his 1989 assessment would be $332,000.00.

2. It violates petitioner's right to due process.

3. It violates petitioner's right of free speech.

4. It conflicts with § 608c(10) of the AMAA.

Discussion

1. Unlawful delegation

Petitioner contends that the authority given to the Almond Board to determine whether to allow a handler credit for its advertising expenditures is an unlawful delegation of the Secretary's legislative and judicial authority.

Administrative functions may lawfully be delegated by the Secretary to an industry group like the Almond Board, provided the industry group functions subordinately to the Secretary and follows standards prescribed by the Secretary. *Sequoia Orange Co.*, 45 Agric. Dec. 11, 36-39 (1986).

In attacks on marketing orders for other agricultural commodities it has been found that the orders in those cases adhered to the requirements for lawful delegation of authority, and, therefore, "[c]onstitutional challenges directed against marketing orders because of their administration by self-interested industry members have been specifically denied for the reason that the Secretary has retained ultimate authority." *Sequoia Orange Co.*, 47 Agric. Dec. 2, 184 (1988) [, *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *appeal*

docketed, No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990)].

The record here shows that the Almond Board has followed the standards prescribed by the Secretary in determining whether handler advertisements are creditable and that, as discussed below, the Secretary retains the authority to make the final decision. Accordingly, as the Board functions subordinately to the Secretary, who retains ultimate authority over matters relating to advertising credits, there has been no unlawful delegation of the Secretary's authority.

2. Due Process

Petitioner contends that he was denied due process because decisions whether to allow him credit for his advertisements are based on the staff's subjective value judgment. He also suggests that the review procedure is unfair because half of the advertising committee members and a majority of the Board members that review the staff's recommendations represent petitioner's major competitor, Blue Diamond, a large cooperative.

The staff's authority in deciding whether advertising is creditable is not unfettered. The staff is required to follow the standards prescribed by the Secretary. In the two instances involved here the applicable standard related to whether the advertisements promoted the sale, use, or consumption of almonds, and whether anything in the advertisements detracted from that purpose.

One of petitioner's advertisements was a self-promotional piece directed at growers, while the

other, although promoting almonds, included critical comments concerning petitioner's objection to the marketing order. In these circumstances, it was neither arbitrary, nor capricious, nor an exercise of subjective value judgment, for the staff to determine, based on the Secretary's objective standard, that the advertisements contained material that detracted from promoting the sale, use, or consumption of almonds. Therefore, as the staff's procedure was to follow the Secretary's standards it did not violate petitioner's due process.

With respect to his complaint that his competitor, a large cooperative, sits in judgment of his advertising, petitioner raises a matter that is a potentially troubling problem in any marketing order industry where a dominant cooperative is in the position on the industry board to use its clout to the disadvantage of smaller independents. This power of cooperatives is well recognized by the Secretary. As pointed out in *Sequoia Orange Co.*, AMA No. F&V 908-2 (Aug. 17, 1989) (which quoted extensively from Congressional reports, court decisions, and prior decisions by the Secretary), [*rev'd*, No. CV-F-89-632-EDP (E.D. Cal. Nov. 28, 1990)], marketing orders are designed to benefit cooperatives and may even have the effect of giving them a monopoly of the market.[4] *Sequoia* also noted that cooperatives are put in a position by marketing orders where their "ulterior motives" may be their own "aggrandizement" and that they may use their power on an industry board to defeat minority views.

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[4] Blue Diamond claims that its share of grocery store shelf space for its products is 92 percent (petitioner's exhibit H).

The existence and exercise of this power, while lawful, obviously creates a . . . risk that an independent handler like petitioner may not get a fair shake from an industry board whose majority is composed of representatives from a large competitor.

Although there is no evidence in the record that petitioner's competitor used its power on the Board to deny petitioner credit for his advertising, the competitor is nonetheless in a position where it could for its own "aggrandizement" take action under the cloak of authority of the marketing order that would unfairly affect petitioner's interests. There is, therefore, a . . . risk in this procedure that petitioner's due process rights may be jeopardized. However, this procedure is not necessarily invalid if additional procedural due process safeguards are present. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

There are, I find, such additional safeguards present here. First, a representative from the Secretary is present when the Board considers requests for advertising credits. Although the representative's function is somewhat murky, one function he does provide is oversight for the Secretary through the reports he makes to his superiors who, in turn, would presumably correct any misapplication or abuse of the order. *Cf. Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

Second, petitioner has the right to appeal the Board's decision to the Secretary who can then make a final decision on the matter.

Although petitioner argues that these procedural safeguards are not written or spelled out in the order

or regulations, they do in fact exist. Thus, whether in the regulations (as they should be) or not, they constitute safeguards that ensure petitioner's right to due process.[5] Petitioner's due process was therefore not denied.

3. Free Speech

Petitioner contends that the promotional assessment program violates his right of free speech because he must advertise according to the type of advertising his competitors on the Almond Board consider appropriate.

The Board, however, does not decide what types of advertising petitioner can engage in. Petitioner makes that decision, but if he wants to claim credit for his advertisements he must conform to requirements established by the Secretary.

Even so, petitioner does not lose his right of free speech when he seeks credit for his advertising, since advertising is a protected form of "commercial" speech. Commercial speech can be constitutionally restricted by the government . . . when the government shows that it has a substantial interest in doing so and when it uses means that directly advance that interest. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985).

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[5] Contrary to petitioner's argument, his due process is not violated because there is review of his application by the staff and Committee, as well as by the Board. If anything, this procedure provides more protection for petitioner than the Order requires.

The government certainly has a substantial interest in the economics of agricultural products and an ideologically neutral law imposing mandatory assessments on members of a particular agricultural industry to promote the products of that industry, although impacting on an industry member's free speech, does not necessarily violate the free speech rights of that member. *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied* [, 110 S. Ct. 1168], ___ U.S. ___ (1990).[6]

In this case, the Congress has expressly found in the AMAA that a promotional assessment program may be appropriate for the almond industry. In view of this expression of interest by the Congress, I find that the government has indicated that it has a substantial interest in the economic well-being of that industry. (See also *Cal-Almond, Inc., et al.*, 89 AMA No. F&V 981-5, slip op. at 28-29 (March 19, 1990)). Accordingly, as the Almond Order is an ideologically neutral program that serves only to advance the products of the almond industry it does not violate petitioner's right of free speech. [As to the Judicial Officer's views as to the appropriate test

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[6] Petitioner contends that, unlike *Frame*, his advertisements are entitled to the greater protection afforded noncommercial speech because they contain his ideological and philosophical opposition to assessments. The almond assessment program, however, like the program in *Frame*, is ideologically neutral and serves only to engage in commercial speech on behalf of members of the industry. Petitioner's attempt to insert his personal views in his advertising does not thereby change the commercial character of the advertising, for, as the court noted in *Zauderer* (p. 637, n.7), "advertising which 'links a product to a current public debate' is not thereby entitled to the Constitutional protection afforded noncommercial speech."

for government regulation which impinges on commercial free speech, see *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23, slip op. at 82-83 (Jan. 23, 1991), (attached as an Appendix to this decision), *appeal docketed*, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991)].

4. Section 981.441(c)(2) of the Secretary's Regulations v. Section 608c(10) of the AMAA

. . . .

Findings of Fact

1. Petitioner Cal-Almond, Inc., is a California corporation whose mailing address is 6049 Leedom Road, Hughson, California 95326.

2. At all times material herein, petitioner was a handler of almonds in the State of California.

3. A marketing order for California Grown Almonds was promulgated by the Secretary of Agriculture to, in part, promote the sale, use and consumption of almonds.

4. The order provides for a ten-member Almond Board composed of industry representatives to assist the Secretary in administering the Order according to standards prescribed by the Secretary.

5. The Board functions subordinately to the Secretary and the Secretary retains ultimate authority over the administration of the Order.

6. The Secretary has promulgated rules and regulations to implement the order.

7. The Almond Board has created a Public Relations and Advertising Committee to promote the sale, use and consumption of almonds.

8. The Almond Board, pursuant to the Secretary's Order and regulations, has imposed assessments on handlers as part of its program to promote almonds and allows handlers credit toward their assessments for their direct advertising expenditures.

9. Handlers may receive credit only if they comply with the Secretary's regulations concerning their advertising.

10. A Board staff reviews applications for credit and makes recommendations to the Board concerning whether an advertisement is creditable.

11. The Board's decision on whether an advertisement is creditable may be appealed to the Secretary.

12. The Board and its staff follows the Secretary's standards concerning whether an advertisement is creditable.

13. Secretary's standards regulate both the amount of advertising expenditure that may be creditable and the content of the advertisement [that may be creditable].

14. Petitioner submitted two advertisements for credit in 1989.

15. The Board denied petitioner credit for the two advertisements because they did not meet the Secretary's standards regulating the content of the two advertisements.

16. Petitioner did not appeal the Board's decision to the Secretary.

Conclusions of Law

1. The Secretary's Order and regulations do not constitute an unlawful delegation of the Secretary's authority.

2. The Secretary's Order and regulations do not violate petitioner's right of due process or free speech.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Most of the issues presented in this case were decided by the Judicial Officer in *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23 (Jan. 23, 1991), *appeal docketed*, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), which is attached as an Appendix to this decision.

The ALJ's views that § 981.441(c)(2) of the regulations (7 C.F.R. § 981.441(c)(2)) violatess 8c(10) of the Act (7 U.S.C. § 608c(10)) is contrary to my views set forth in Saulsbury (slip op. at 12532), which are adopted by reference here.[7]

Since I am dismissing the petition, there is no need to decide whether the ALJ's conclusion, that the case should be remanded to the Secretary (Agricultural Marketing Service) to review the Board's determination as to petitioner's two 1989 advertisements, would have been correct. However, if I were to decide the

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[7] The petitioner here is also a petitioner in *Saulsbury*, but it makes no difference in this case whether *res judicata* or *stare decisis* is applicable.

issue, I would disagree with the ALJ, since it is up to the handler to decide whether to seek review of the Board's determination by the Secretary. In any event, the issue would now be moot inasmuch as petitioner later sought review by the Secretary, and the Secretary affirmed the Board's decision.

For the foregoing reasons, the following order should be issued.

Order

The relief requested by petitioner is denied and the petition is dismissed.

APPENDIX

In re Saulsbury Orchards & Almond Processing, Inc., 50 Agric. Dec. 23 (Jan. 23, 1991), *appeal docketed*, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991).

[Not published herein.-Editor]

APPENDIX K

UNITED STATES
DEPARTMENT OF AGRICULTURE

Nos. 89 AMA Docket No. F&V 981-5 and
89 AMA Docket No. F&V 981-6

IN RE: CAL-ALMOND, INC. AND GOURMET PACKING CO., INC.

and

IN RE: GOLD HILLS NUT CO., INC.

[Decision and Order filed March 8, 1991]

By: DONALD A. CAMPBELL, Judicial Officer

This is a proceeding instituted by petitions filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Order Regulating the Handling of Almonds Grown in California (7 C.F.R. Part 981).*

On March 19, 1990, Chief Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order holding against petitioners on all issues except two. As to the issues decided in petitioners' favor, the ALJ held that the 1988-89 rules requiring petitioners

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* *See generally* Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, §§ 2.01-.015, 2.46-.58 (1981 and 1989 Cum. Supp.).

to hold almonds in reserve and to pay administrative assessments were invalid retroactive rules.

On April 20, 1990, petitioners appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35),** as to the issues decided adversely to the petitioners. On April 25, 1990, respondent appealed as to the two issues decided adversely to the Department. On December 21, 1990, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, I agree with respondent's appeal and find no merit in petitioners' contentions. Accordingly, I am dismissing the petitions. I am adopting those portions of the ALJ's initial decision set forth below, with a few trivial changes, and with additions included within brackets, and omissions indicated by dots. Additional conclusions by the Judicial Officer follow the ALJ's initial decision.

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

These are consolidated proceedings concerning common issues of law and fact, initiated by petitions filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c(15)(A)) (the Act). The petitions challenge the lawfulness of obligations imposed upon the Petitioners as handlers of almonds grown in California under Marketing Order 981 (7 C.F.R. Part 981) (the Order).

An oral hearing was scheduled to begin on June 6, 1989, but was canceled at the suggestion of the parties, who have addressed the issues through the filing of documents and briefs. On May 8, 1989, Blue Diamond Growers, Inc., moved to intervene. In accordance with 7 C.F.R. § 900.57, Blue Diamond was denied the status of an Intervenor but was permitted to file briefs. On August 17, 1989, Petitioners filed a Joint Opening Brief in which they withdrew a number of issues raised in the petitions and refined the issues to be resolved.

Petitioners' Joint Opening Brief, at 2-4, specifies fifteen issues for adjudication. In essence, they question (a) whether the Secretary's rulemaking action requiring handlers to withhold in reserve 25% of almonds handled during the 1988-89 crop year was in accordance with law; (b) whether interpretations by the Almond Board and the Agricultural Marketing Service (AMS) respecting the actions handlers need to take to comply with the reserve requirements were valid under the Act or the Order; (c) whether the Secretary's rulemaking action which imposed assess-

ments on all almonds handled during the 1988-89 crop year to pay the Almond Board's expenses and the cost of almond advertising and promotion was in accordance with law; and (d) whether the Almond Board's act of placing a newspaper advertisement informing growers of possible obligations under the marketing order was in accordance with law.

Briefing was completed on December 5, 1989. The parties and Blue Diamond Growers, Inc., have submitted proposed findings of fact, proposed conclusions of law, and briefs. The parties have also filed numerous exhibits and written statements in response to questions I posed to them regarding the way in which the marketing order operated in practice.

On January 2, 1990, Petitioners filed a request for an evidentiary hearing to present evidence in response to Respondent's and Intervenor's answers to the questions I had posed. Petitioners' request expressed concern that the purpose of the questions was "to determine the economic impact upon the Petitioners in order to make a finding as to whether or not Petitioners' injury is *de minimis* and what the impact of a reserve has upon the Petitioners." This interpretation is incorrect. I posed the questions to obtain a better understanding of how the Order actually operates and to compare my tentative interpretations of pertinent Order provisions with those of counsel. Although Petitioners must demonstrate themselves to be aggrieved handlers to meet jurisdictional requirements, the exact magnitude of any dollar damages they may have experienced as the result of actions taken under the marketing order is not a relevant issue in this proceeding and, accordingly, has not been considered. Of the many factual assertions contained in the responses, I have included

as findings of fact only that Petitioners sell most of their almonds into the export market and that they desired to store 1988-89 reserve almonds at their leased warehousing facilities in West Germany. Because these assertions are undisputed and are the only factual components of the responses that I have considered to be relevant and helpful evidence, there is no need for a hearing. Accordingly, Petitioners' motion for an evidentiary hearing and a status conference is denied, and their motion to disregard Respondent's and Intervenor's factual assertions, other than as I have specified, is granted.

All materials filed by the parties and Intervenor have been reviewed. To the extent indicated below, the proposed findings, conclusions, and arguments have been adopted. All other findings, conclusions, and arguments have been rejected as irrelevant, immaterial, or lacking legal or factual basis.

Background

The California almond industry is regulated by Marketing Order No. 981, 7 C.F.R. Part 981, promulgated pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* The Order establishes a regulatory scheme which is applicable to "handlers." Under the Order, a "handler" is one who "handles" almonds. Handling is defined in 7 C.F.R. § 981.16:

> "To handle" means to use almonds commercially of own production or to sell, consign, transport, ship (except as a common carrier of almonds owned by another person) or in any other way to put into the channels of trade, either within the area of production or from such area to points outside thereof, or to receive as the first receiver

> thereof at any point of entry in the United States and Puerto Rico, almonds which have been exported therefrom and are submitted for reentry or are reentered free of duty: *Provided*, That sales or deliveries by growers to handlers within the area of production shall not be considered as handling.

The Order is administered by the Almond Board of California (the Board), which is an elective body composed of industry representatives. *See* 7 C.F.R. §§ 981.30-.40. The duties of the Board include acting as intermediary between the Secretary and industry members; investigating and collecting data on growing, shipping, and marketing conditions with respect to almonds; furnishing pertinent information to the Secretary; and keeping records of its acts and transactions. 7 C.F.R. § 981.39.

The Board is authorized:

> to incur such expenses as the Secretary may find are reasonable and likely to be incurred by it during each crop year, for the maintenance and functioning of the Board, including the accumulation and maintenance of an operating reserve fund, and for such purposes as the Secretary may, pursuant to the provisions of this subpart, determine to be appropriate.

7 C.F.R. § 981.80.

The Board is required to submit its recommended budget to the Secretary on or before August 1 of each crop year. Funds to cover the Board's expenses are generated by levying assessments on each handler, in proportion to the kernel weight of almonds handled. 7 C.F.R. § 981.81. In practice, the assessment rate per

pound is determined through dividing the total of anticipated Board expenditures by the anticipated total kernel weight of assessable almonds handled by the industry. *See, e.g.*, 53 Fed. Reg. 43850 (October 31, 1988).

The Almond Board budget at issue in this proceeding included funds for advertising and promotion projects authorized under 7 C.F.R. § 981.41(a). That section states in part that:

> [t]he Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving . . . marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized.

Under the provision, handlers are given the choice of remitting to the Board the full amount of their pro rata expense assessment or applying for credit against their obligation in the amount of the difference between the creditable portion of their obligation and their direct expenditures for advertising. 7 C.F.R. §§ 981.41(c) and (d) and 981.441 set forth application procedures, limits on the amount of credit and restrictions on the type of advertising for which credit may be claimed.

The almond marketing order also provides that the Secretary shall impose restrictions on the quantity of almonds which may be handled in any crop year by his designation of the percentages of almonds which

shall be salable almonds and reserve almonds whenever he finds that such action would tend to effectuate the declared policy of the Act. These findings may be based upon "recommendations and supporting information supplied by the Board or . . . any other available information." 7 C.F.R. § 981.47. In establishing such salable and reserve percentages for a crop year, the Order provision has the Secretary consider the ratio of estimated trade demand to the estimated production of marketable almonds, or the allocation quantity of almonds, whichever is applicable. In years of estimated oversupply, restrictions on the quantity of almonds available in the marketplace have generally been imposed to maintain adequate returns to growers. In the event of a small crop the following year, reserves are available to meet the trade demand and stabilize prices.

When a reserve percentage is in force, a handler must withhold from handling a quantity of almonds having a kernel weight equal to the reserve percentage of the weight of all almonds received by that handler for his own account during that crop year. This quantity is referred to as the handler's reserve obligation. 7 C.F.R. § 981.50. A handler satisfies his reserve obligation by holding in his possession or under his control, in proper storage, the prescribed quantity of almonds. The reserve quantity must be maintained by the handler at all times while the reserve percentage is in effect. 7 C.F.R. § 981.52. Alternatively, handlers may deliver their reserve quantities to the Board. 7 C.F.R. § 981.51. However, this option is rarely exercised.

Section 981.70 of the Order provides for the monitoring of compliance with the reserve rules and other requirements imposed under the Order. That

section states in part that "[e]ach handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of . . . records and for inspection and observation of almonds."

The Order also contains provisions for handler assessments.

Findings of Fact

1. Petitioners, Cal-Almond, Inc., and Gourmet Packing Co., are California corporations. Their common mailing address is 6049 Leedom Road, Hughson, California 95326.

2. Petitioner Gold Hills Nut Co., is a California corporation. Its mailing address is P.O. Box 482, Snelling, California 95369.

3. At all times material herein, Petitioners were handlers of almonds in the State of California.

4. Petitioners sell the vast majority of their almonds into the export ingredient market. Their whole almonds are not sold in stores in the United States or elsewhere under particular brand names. Petitioners sell relatively small quantities of whole almonds to consumers in the United States by mail.

5. On July 20, 1988, the Almond Board of California (the Board) voted to recommend to the Secretary of Agriculture that a reserve of 25% be established for the 1988-89 crop year.

6. Subsequent to the July 20, 1988, meeting, the Board published several informational notices. A photocopy of one such notice, which would appear to be a newspaper advertisement, is in evidence as RX 19. The text states that growers who sell their crops to anyone other than a handler registered with the Almond Board of California are responsible for obli-

gations under the almond marketing order, which include holding 25% of marketable tonnage in an unallocated reserve and an assessment of 2.65 cents per pound. The notice further states:

> Failure to meet these requirements is a violation of Federal law. Willful and deliberate violations carry penalties of a maximum of $5,000 per violation. Actions are brought in Federal District Court by the Department of Justice. For further information, call or write Almond Board of California, P.O. Box 15920, Sacramento, California 95852 (916) 929-6506.

7. On September 16, 1988, AMS published in the *Federal Register* a proposed rule that would establish salable, reserve, and export percentages of 75%, 25%, and 0%, respectively, for almonds received by handlers during the 1988-89 crop year. 53 Fed. Reg. 36051 (September 16, 1988). The proposal stated generally that the rule is intended to prevent unreasonable fluctuations in shipments and prices in view of the very large anticipated supplies of almonds, both in California and the rest of the world.

8. The proposal further stated that, while the rule might restrict the quantity of almonds which handlers would sell in normal domestic and export markets, the proposed salable and reserve percentages were found necessary to lessen the impact on prices of the oversupply of almonds that year, to promote stronger marketing conditions, to avoid unreasonable fluctuations in prices and supplies, and to improve returns to growers. Reserve almonds could be released for sale at a later date if the salable percentage was discovered to be insufficient to satisfy the 1988-89 trade demand. This demand would include the

desirable carryover requirements for the 1989-90 season. The 25% reserve percentage was proposed to enhance market stability during the 1989-90 crop year in the event that 1989 production would be insufficient to meet the trade demand. The proposal stated that if the reserve was not later released or carried over, the reserve almonds could be diverted to secondary outlets. 53 Fed. Reg. 36052 (September 16, 1988).

9. This proposed rule for salable and reserve percentages was based upon a recommendation of the Board and upon other available information. 53 Fed. Reg. 36052 (September 16, 1988).

10. The Board based its recommendation for the reserve and salable percentages on estimates of marketable supply and combined domestic and export trade demand for the 1988-89 crop year. The Board estimated that supply for the 1988 season would be 556.8 million kernel weight pounds. This amount was based upon the Board's 1988 crop estimate of 580 million kernel weight pounds, minus an estimated 23.2 million kernel weight pounds lost through manufacturing and the removal of inedible kernels. 53 Fed. Reg. 36052 (September 16, 1988); PX 25, 31.

11. Trade demand was calculated to be approximately 530 million kernel weight pounds. This amount included 160 million kernel weight pounds for domestic needs and 370 million kernel weight pounds for export needs. An inventory adjustment was made to account for salable almonds carried in from the 1987- 88 crop year; for the 1987-88 crop year reserve released on August 1, 1988; and for supplies of salable almonds deemed desirable to be carried out on June 30, 1989, for early shipment during the 1989-90 crop year until the 1989 crop is available for market. With these adjustments, the trade demand was estimated to be

417.6 million kernel weight pounds. The proposed rule included a tabular presentation of the estimates and calculations upon which the Board's recommendation to the Secretary was based. 53 Fed. Reg. 36052 (September 16, 1988); PX 25.

12. The AMS found that 75% of the almond crop would satisfy trade demand. The other 25% of the total was to be withheld by handlers to satisfy the reserve obligation. 53 Fed. Reg. 36052 (September 16, 1988); PX 25.

13. The AMS announced that interested persons would be allowed 15 days in which to comment on the proposed rule. The AMS stated its finding that a comment period of 15 days was adequate given that the crop year to which the proposed reserve rule would apply began July 1, 1988. The AMS further stated that since late summer and early fall are usually active times for almond sales, handlers and buyers should know as soon as possible the extent to which volume regulation would be in effect for the crop year. 53 Fed. Reg. 36053 (September 16, 1988); PX 25.

14. The proposed rule was reviewed by the Secretary under Executive Order No. 12,291 and Departmental Regulation 1512-1 and was determined to be a "non-major" rule. 53 Fed. Reg. 36051 (September 16, 1988); PX 25.

15. During the 15-day comment period, 11 comments on the proposed rule were received. The commenters were Steven W. Easter of Blue Diamond Growers; Budge Brown of Brown Enterprises; Frank S. Swain, Chief Counsel for Advocacy of the Small Business Administration; Lars E. Johnson of L.E. Johnson Almonds Orchards; Gary Powell of Quality Nut Co.; Cloyd Angle of Cal-Almond, Inc.; Robert G.

den Dulk; James G. Crecelius of Monte Vista Farming Co.; Brian Leighton, counsel to the Independent Almond Handlers Association; Daniel L. Mallory of Roberts Ferry Nut Co.; and Les Portello of Portello Ranch. 54 Fed. Reg. 3585 (January 25, 1989); PX 26, 27, 28.

16. Blue Diamond Growers expressed support for the proposed rule. The other 10 commenters opposed a 25% reserve for the 1989-90 crop year. PX 26, 27, 28.

17. The AMS published the final rule, including its responses to comments, in the *Federal Register* on January 25, 1989. 54 Fed. Reg. 3584 (January 25, 1989); PX 26.

Because many of the objections to the proposed reserve rule appeared in more than one commenter's remarks, the AMS found it impractical and duplicative to address the submissions seriatim. Therefore, the responses generally address objections without reference to the parties raising them.

18. Several commenters asserted that a 25% reserve is larger than required. Some stated that no reserve should be imposed, whereas others suggested a 10 to 15% reserve for the year. The arguments advanced for no reserve or a smaller reserve included (a) that making all almonds available for sale might expand almond markets; (b) that the crop yield estimate on which the recommended reserve percentage is based may be significantly higher than the actual yield; (c) that, in the event of a large crop the following year, the 25% reserve might result in an excessive carryover of inventories; and (d) that, in the event of a large crop the following year, disposition of 1988-89 reserve almonds into noncompetitive outlets would result in low returns on 25% of the year's crop.

In response, the AMS stated that many of these concerns were raised and discussed at the July 20, 1988, meeting of the Board. The AMS further stated that a reserve percentage that is based upon an inaccurate initial estimate of crop yield can be revised by the Board:

> [T]he Board monitors ongoing developments in the industry, including such factors as whether the total almond production in the current crop year will fall short of early season estimates. The Board has the responsibility to recommend an increase in the salable percentage later in the season if it appears that supplies made available by the initial free percentage will be insufficient to meet trade demand needs. The next NASS [National Agricultural Statistics Service] estimate will be available early in 1989. However, the Board need not wait until the early 1989 estimate, but may recommend revising the salable and reserve percentages at any time until May 15 of each year, if other information available to the Board indicates such revision is necessary to provide sufficient supplies to meet trade demand.

54 Fed. Reg. 3586 (January 25, 1989).

19. A number of commenters questioned the benefits of a 25% reserve. Some argued that because early season demand for almonds was high, a reserve was unnecessary and would "reduce sales at the start of the season." 54 Fed. Reg. 3586 (January 25, 1989).

In its response, the AMS appears to have adopted the reasoning of Blue Diamond, as expressed by Mr. Easter:

> Steven W. Easter of Blue Diamond, however, in his comment in support of the proposed salable

> and reserve percentages, wrote that if the almond industry were to release all of the available almond tonnage to the market immediately without the use of the reserve, the impact on growers' returns would be "disastrous." Use of zero percent reserve at the opening of the crop year would be very detrimental to almond prices, Mr. Easter wrote. In his opinion, if there were no reserve, monetary returns to growers might not even cover the costs of almond production. He added that he also believes that all of the available almonds could not be absorbed by the market this year, and that if all available almonds were marketed, speculative buying of almonds would occur at very low prices in an unstable market. Mr. Easter added that since 1970, at least one year in three has yielded a small almond crop with consequent shortages in the marketplace. The use of the reserve in this year of excess supply, this commenter stated, would also provide a buffer in the event of a short crop and an undersupplied market next year, which is a statistical possibility, and would provide market stability.

54 Fed. Reg. 3586 (January 25, 1989).

20. Some commenters asserted that the proposed reserve would be detrimental to small handlers. These comments generally advanced the argument that reserves place a disproportionate burden upon small handlers and that small handlers realize maximum net gain if permitted to sell all of their almonds in the early part of the season. In response, the AMS stated:

> [T]hese comments do not take into account the fact that if there were no volume regulation, not only the commenters' own businesses but most other small almond handlers would be trying to sell their almonds quickly in order to reduce storage or holding costs. Large handlers also would continue to aggressively market their almonds, and the market would be under the pressure of record large supplies, driving down prices received for almonds. Prices likely to be received by handlers under such rapid marketing of their almonds (i.e., without a reserve) would not be the same as prices with a reserve in place. Without a reserve, prices would be expected to be significantly lower in an oversupplied market. The advantage described by a handler if that handler were able to market all its almonds immediately, is valid only theoretically, because in actual practice most handlers would likely follow the same course of action, and thus, no particular handler would be able to market its almonds immediately without stiff competition from the rest of the industry also attempting to do so. While large handlers traditionally market throughout the crop year, it is reasonable to assume that, without regulation, they also would seek to market more of their almonds early in the crop year.

54 Fed. Reg. 3586 (January 25, 1989).

21. Several commenters questioned whether the price-increasing effects of the reserve would be sufficient to compensate for the reduced volume of almonds available for sale. In response, the AMS stated that:

these commenters equate the reserve to losing 25 percent of their crop. In actual practice, the 25 percent reserve is not lost to the market. Commonly, a portion of the reserve, and in some cases the entire reserve, is released to be freely salable later in the season, as the 18 percent reserve portion of the crop was released in the 1987-88 crop year. Such releases may occur once a portion of an annual crop has been marketed, and the danger of a seriously oversupplied market early in the marketing season, with consequent price reductions, has passed.

In the event that the reserve is not released, it would be marketed to low-value outlets noncompetitive with normal markets. While reserve almonds would not likely be sold at prices comparable with salable almonds, the improved prices received for the salable portion of the crop and the improved stability of the industry are expected to compensate for this reduction.

. . . The Department anticipates that the Board will review economic conditions as the season progresses and will make recommendations to release reserve almonds as they are needed. Again, if the reserve almonds are eventually disposed of into low-value outlets, the revenue gain on the salable portion of the crop would be maximized as much as possible. This would take place, for example, if the production surplus cannot be absorbed by the market and releasing the reserve would be detrimental to the market.

54 Fed. Reg. 3587 (January 25, 1989).

22. Mr. Leighton's comment, in part, challenged the determination of the AMS, pursuant to Executive Order No. 12,291, that the reserve rule is "non-major." Specifically, Mr. Leighton asserted that the rule is "major" because it would have an annual economic effect of more than $100,000,000. In response, the AMS stated:

> [T]he commenter arrives at this "impact figure" by calculating the total dollar value of the reserve (approximately 139 million kernel weight pounds) and equating this figure to lost revenue. In actual practice, the reserve does not equal lost revenue, because such a calculation does not take into account expected improved returns for the 75 percent salable portion of the crop, or the returns received for the 25 percent of the crop which will be sold to low-value outlets or released to the salable category later in the season. In the event that some or all of the reserve is transferred to the salable category later in the season, there would not be a reduction of revenue received for the reserve, but improved returns would be anticipated for both the reserve and the initial salable percentage of 75 percent of the 1988-89 almond crop.

54 Fed. Reg. 3587 (January 25, 1989).

23. Several commenters expressed opinions as to the fairness of the Order and the extent of Blue Diamond's influence upon its operation. In response, the AMS stated:

> Miscellaneous comments were also received concerning the perceived fairness or unfairness of the almond marketing order in general and the makeup of the industry representation on the

> Board between members representing the cooperative and independents. This final rule only concerns the establishment of salable, reserve and export percentages for almonds. However, marketing agreement and Order No. 981 regulating the handling of almonds grown in California are effective under the Agricultural Marketing Agreement Act of 1937, as amended, and the nomination and selection of the members on the Committee are pursuant to the procedures that appear in the provisions of the order.

54 Fed. Reg. 3587 (January 25, 1989).

24. The final rule established a reserve of 25% of the 1989-90 almond crop. The text of the rule includes a finding that the reserve would tend to effectuate the declared policy of the Act. 54 Fed. Reg. 3584 (January 25, 1989); PX 26.

25. The AMS also considered the economic impact of the reserve percentage on small entities. The agency noted that the majority of handlers in the industry might be classified as small business entities and found that the proposed action would not have a significant impact on a substantial number of small entities. Specifically, it was found that any costs imposed on the businesses by the rule were expected to be more than offset by the benefits derived from it. 54 Fed. Reg. 3584 (January 25, 1989); 53 Fed. Reg. 36051-52 (September 16, 1988); PX 25, 26.

26. Mr. Frank Swain of the Small Business Administration submitted a comment expressing, in part, the concern that a reserve might result in a loss of market share by small handlers. Mr. Swain specified that this might occur if the reserve interfered with

the handlers' performance of contractual obligations. In response, the AMS stated:

> [T]he almond marketing order has been in effect since 1950 and many reserve percentages have been established. Handlers are aware of the marketing order and program operations conducted under the order, and plan their business operations accordingly. Thus, the probability of a large almond crop this year, in addition to the large carryover from the prior season, would be sufficient cause for handlers to anticipate the establishment of a reserve and plan their business operations accordingly. . . .

54 Fed. Reg. 3587 (January 25, 1989).

27. The effective date of the final rule was stated to be 30 days after its publication in the *Federal Register* on January 25, 1989. 54 Fed. Reg. 3584 (January 25, 1989). The rule specifically stated that a delayed effective date was being used to give handlers the opportunity to achieve compliance.

28. On July 31, 1989, a final rule was published in the *Federal Register* reducing to zero the reserve percentage applicable to almonds received during the 1988-89 crop year. 54 Fed. Reg. 31502 (July 31, 1989).

29. The Almond Board has adopted the position that reserve almonds must be stored within the State of California. The Board informed handlers, including Petitioners, of this requirement in a letter dated June 15, 1988. PX F.

30. Petitioner Cal-Almond sells most of its almonds into the export market. It had leased warehouse space in West Germany and wished to store its 1988-89 reserve almonds there pending release of the reserve. Petitioner refrained from storing reserve

almonds in West Germany in compliance with the Board's position.

31. AMS, upon consultation with the Office of the General Counsel, sent a letter to the Board, dated December 14, 1988, in which it stated its position that a contract for the disposition of reserve almonds entered into before the release of the reserve constitutes a sale or consignment and, as such, is an act of handling under the Order, which would be detrimental to the reserve program. RX 18. In deference to this position, Petitioners refrained from entering into contracts for future sale of reserve almonds.

32. On July 21, 1988, the Almond Board met and voted unanimously to recommend to the Secretary an assessment rate of 2.65 cents per pound of assessable almonds, with an allowable advertising credit of 2.5 cents per pound of assessable almonds. This rate was based upon recommended 1988-89 marketing order expenditures of $16,130,309. Assessable almonds include almonds which are required to be withheld in satisfaction of each handler's reserve obligation. PX 31; RX 12.

33. On September 16, 1988, AMS published in the *Federal Register* a proposed rule to establish the assessment rate for the 1988-89 crop year. 53 Fed. Reg. 36053 (September 16, 1988); PX 10.

34. The proposal was reviewed under Executive Order No. 12,291 and Departmental Regulation 1512-1 and was determined to be a "non-major" rule. 53 Fed. Reg. 36053 (September 16, 1988); PX 10.

35. The AMS considered the economic impact of the proposed assessment on small entities. The agency found that while some additional costs would be imposed by the rule, they would consist of uniform assessments on all handlers. These costs would be

offset by the benefits derived from the operation of the marketing order. The agency therefore found that the proposed action would not have a significant economic impact on a substantial number of small entities. 53 Fed. Reg. 36053 (September 16, 1988); PX 10.

36. The AMS considered the budget and the assessment rate recommended by the Board and proposed that these figures be authorized under the Order as recommended. 53 Fed. Reg. 36053 (September 16, 1988); PX 10.

37. The agency found that an expedited process of approval for the budget and assessment rate was needed in order that the Board would have adequate funds. It was further noted that the Board's action upon the recommended budget and assessment rate occurred on July 20, 1988, somewhat later than such action is usually taken. Accordingly, the agency determined that a comment period of less than 30 days was appropriate. 53 Fed. Reg. 36054 (September 16, 1988); PX 10.

38. Interested persons were given 10 days in which to comment on the proposed budget and assessment rule. During this period, three comments were received. The commenters were Steven W. Easter of Blue Diamond Growers, Frank S. Swain of the Small Business Administration, and James G. Crecelius of Monte Vista Farming Co. RX 15.

39. Mr. Easter expressed support for the proposed budget and assessment rate. The other commenters opposed the proposal. RX 15.

40. A final rule approving the Board's recommended budget and assessment rates was published in the *Federal Register* on October 31, 1988. The text of the rule included the finding that the rule would tend

to effectuate the declared policy of the Act. The concerns expressed by Messrs. Swain and Crecelius were addressed at length. 53 Fed. Reg. 43849-50 (October 31, 1988); PX 11; RX 15.

In response to Mr. Swain's objections to the lack of a regulatory flexibility analysis, the Department stated the reasons for its position that no analysis was required in the circumstances. Mr. Swain's concerns as to the fact that the comment period afforded was only 10 days in length were met by the Department's explanation of the Board's pressing financial requirements.

Mr. Crecelius expressed the opinion that the advertising assessment is unfair and wasteful of growers' money. In response, the Department explained the objectives of the advertising program and detailed the numerous promotional activities, other than brand advertising, for which handlers may receive credit against assessments.

41. It was found by the agency that good cause existed for not postponing the effective date of the rule until 30 days after publication in the *Federal Register*. This finding was based upon the Board's need for funds to pay its expenses on a continuous basis and the fact that handlers were made aware of the proposed budget and assessment rate at public meetings of the Board.

Conclusions and Discussion

A. The Secretary's rulemaking action requiring handlers to withhold in reserve 25% of the almonds handled during the 1988-89 crop year was . . . [valid].[1]

. . . .

In addition to the contention that the final rule was retroactive, Petitioners have advanced other arguments for setting aside the rule as invalid.

When the proposed rule was issued, a 15-day comment period was granted. Petitioners state that this was insufficient because a period of 30 days or more is recommended for rulemaking by Departmental Regulation 1512-1 (PX 1). Petitioners urge that the regulation enlarges the requirement imposed upon the Department by the Administrative Procedure Act, 5 U.S.C. § 553(c), that interested persons be given "an opportunity to participate in. . . rulemaking through submission of written data, views or arguments."

Although the Administrative Procedure Act requires that a final rule must ordinarily be published 30 days before its effective date (5 U.S.C. § 553(d)), the statute does not specify how much time must be given for filing comments after the publication of a proposed rule. The Attorney General has interpreted the Administrative Procedure Act only to require "reasonable notice." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 28-29 (1947). And courts have held that Agencies should generally be free to "fashion their own rules of procedure and methods of inquiry."

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[1] [The ALJ's holding, that the Secretary's rulemaking action was not in accordance with law since it was retroactive, is omitted.]

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 543 (1978), *quoting FCC v. Schreiber*, 381 U.S. 279, 290 (1965). It is within the agency's discretion to determine the procedures necessary to provide a "full and fair opportunity to comment on all significant issues in the rulemaking proceeding." *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986). Agency procedures are to be upheld unless they are arbitrary, capricious, or constitute an abuse of discretion. *Id.*

Departmental Regulation 1512-1, by its terms, imposes no rigid requirement to provide comment periods of 30 days or more. Section 4(d)(1) of the regulation specifically preserves the discretion to provide shorter comment periods when "an emergency or other good reason exists." Moreover, this internal directive was not published in the *Federal Register* and is not intended to have the force and effect of law. The Department's purpose in issuing this regulation appears in Section 1:

> This directive is intended only to improve the internal management of the Department and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person.

I therefore conclude that section 4(d)(1) of Departmental Regulation 1512-1 does not create any requirement to provide comment periods of 30 days or more. *Cf. Brennan v. Ace Hardware Co.*, 495 F.2d 368, 376 (8th Cir. 1974) (internal handbook for agency personnel does not itself create requirements binding upon agency). Departmental compliance with this guideline, as such, is not reviewable. A decision to

provide a comment period of less than 30 days is invalid only if it is arbitrary, capricious, or an abuse of discretion within the meaning of the Administrative Procedure Act. *See Phillips Petroleum Co.*, 803 F.2d at 559.

The Department's decision to grant interested parties a period of 15 days in which to comment on the proposed 1988-89 reserve rule was not arbitrary, capricious, or an abuse of discretion. The Department's stated goal of expediting the promulgation process was reasonable, though somewhat ironic, given the rule's retroactive character.

. . . [T]here is no credible evidence that the use of a 15-day comment period in itself denied Petitioners or others a full and fair opportunity to comment on the issues. Petitioners' counsel, as well as other interested persons, filed extensive comments. Since the proposed percentage was the percentage recommended by the Board, Petitioners had ample opportunity even prior to the Department's call for comments to formulate their objections. I therefore conclude that the 15-day comment period in no way prevented Petitioners from fully formulating and presenting their views to the Department.

Petitioners also argue that the procedures which the Department employed in promulgating the reserve rule failed to comply with Departmental Regulation 1512-1 and Executive Order No. 12,291, 3 C.F.R. 127 (1981 Comp.), *reprinted in* 5 U.S.C. § 601 at 473 (1988). Specifically, Petitioners challenge the determination that the rule was not "major" within the meaning of the Departmental Regulation and section 1(b) of the Executive Order.

Petitioners' challenge is based on the incorrect assumption that the Department's compliance with

Executive Order No. 12,291 is reviewable, *as such*. Section 9 of the Executive Order states:

> *Judicial Review.* This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

3 C.F.R. 133-134 (1981 Comp.). This language evinces the "clear and unequivocal intent that agency compliance with Executive Order No. 12,291 not be subject to judicial review." *State of Mich. v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986). *Cf. In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (analogous holding with respect to Executive Order providing for inflationary impact statements).

The holding of *State of Mich. v. Thomas* applies with equal force to Departmental Regulation 1512-1. The intent of the Executive Order is not erased when its provisions are merely restated in intra-agency guidelines such as those contained in the Departmental Regulation. This purely internal restatement confers no private right of action. *See Brennan v. Ace Hardware Co.*, 495 F.2d at 376. Accordingly, I conclude that the Department's compliance, as such, with Executive Order No. 12,291 and Departmental Regulation 1512-1, in connection with the promulgation of the 1988-89 reserve rule is not *per se*

judicially reviewable and, by inference, not reviewable in this adjudicative proceeding. *See, e.g., County Line Cheese Co. and Meadow Gold Dairy*, 44 Agric. Dec. 63 (1985) (on the distinction between the Secretary's legislative and adjudicative capacities).

The Executive Order's provisions respecting judicial review are similar to those found in the Regulatory Flexibility Act, 5 U.S.C. § 611, which provide that "any analysis that is undertaken shall be part of the whole record of agency action." Justice Scalia, while a member of the United States Court of Appeals for the District of Columbia Circuit, interpreted this language to mean that although agency compliance is not reviewable, *as such*, the rule itself will be set aside "if data in the regulatory flexibility analysis—or data anywhere else in the rulemaking record—demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious." *Thompson v. Clark*, 741 F.2d. 401, 405 (D.C. Cir. 1984). My review of the whole record leads me to conclude that the Department's assessment of the effects of the reserve rule on industry members meets the "general legal requirement of reasoned, nonarbitrary decision-making." *Thompson v. Clark*, 741 F.2d at 405. As demonstrated by the statements contained in the final rule (findings 20-22, in particular), the Department fulfilled the requirements of the APA and addressed in a rational manner Petitioners' stated concerns.

Finally, Petitioners challenge the 1988-89 reserve rule as a taking of property without just compensation, in violation of the Fifth Amendment to the United States Constitution. They argue that the rule so restricts their use of property that it effects a

regulatory taking requiring compensation. Petitioners' argument is rejected.

It is well established that regulation pursuant to the Agricultural Marketing Agreement Act of the volume of an agricultural commodity moving in interstate commerce does not, as a general matter, constitute an unconstitutional deprivation of property. *See, e.g., United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 568-81 (1938); *United States v. Mills*, 315 F.2d 828, 838 (4th Cir. 1963). And courts have specifically held that marketing order provisions fixing prices and restricting the sale of reserves do not constitute takings without just compensation. *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (1938); *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785 (1975). In both of the latter cited cases, it was held that the regulatory program in question provided at least some compensation to the affected parties. The *Prune* court further noted that the amount of compensation is a policy decision made, at least initially, by a committee elected to represent the interests of the entire industry. *Prune Bargaining Ass'n*, 444 F. Supp. at 793.

The cited holdings rest in part upon the view that the just compensation clause is applicable only to a "direct appropriation of property." *See, e.g., Wallace*, 98 F.2d at 989. However, the Supreme Court has more recently held that a governmental action "short of acquisition of title or occupancy" can amount to a taking "if its effects are so complete as to deprive the owner of most of his interest in the subject matter." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), *quoting United States v. General Motors*

Corp., 323 U.S. 373, 378 (1945).[2] "Property," as used in the Takings Clause, refers to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors*, 323 U.S. at 377-378. It is therefore clear that restrictions on disposition can constitute takings in some circumstances.

"The inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry." There is no "set formula" which directs this enterprise. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). However, the Supreme Court has identified several factors which should be considered in determining when regulatory action constitutes a taking. These are "the character of the governmental action, its economic impact, and its interference with reasonable, investment-backed expectations." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1005.

The governmental action here is a restriction on the disposition of almonds imposed with the objective, *inter alia*, of stabilizing prices and supplies. It is a valid exercise of the commerce power to control the flow of commodities in interstate commerce and is intended to further a legitimate governmental objective. *See United States v. Rock Royal Co-op., Inc.*, 307 U.S. at 572. The obligation to withhold reserves is imposed equitably upon all handlers. Its imposition is supported in part by the finding that the benefits to handlers in combating the price-depressing effects of

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[2] *See also* Executive Order No. 12,630, 3 C.F.R. 554 (1988 Comp.), *reprinted in* 5 U.S.C. § 601 at 479 (1988) (providing guidance to Agencies on the implications of the more recent Supreme Court decisions for regulatory programs which affect property rights).

excess supply outweigh any costs of maintaining the reserve. Finally, the action taken is the result of close cooperation and negotiation between the Secretary and a representative industry body. Therefore, it would appear that the reserve withholding requirement is most accurately viewed not as an uncompensated taking, but as a required contribution to a well-established, industry-conceived program of economic self-help.

The characterization of governmental action here necessarily includes the issue of economic impact, because reserves are designed to generate certain economic effects. However, the nature and compensatory adequacy of these effects are questions of economic theory and policy. Although the reserve requirements at issue in this case may well have benefited some members of the industry more than others, it is established beyond question that such differential effects are permissible under the Act. The mere existence of these effects does not, of itself, render a given marketing order unconstitutional. *See United States v. Mills*, 315 F.2d at 828. *See also Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). To the extent not specified in the Agricultural Marketing Agreement Act, the selection of the means to implement the statute's policy objectives is "peculiarly a matter of administrative competence." *Sequoia Orange Co., et al.*, 47 Agric. Dec. [2], 87 [(1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *appeal docketed*, No. 90.15505 (9th Cir. April 24, 1990), No. 9015781 (9th Cir. June 11, 1990)]. Therefore, the policy decisions underlying reserve rules may properly be challenged only by appeals to

the Secretary in his legislative capacity or in the Halls of Congress.

The "weighing of public and private interest" required in just compensation clause analysis, *Agins v. Tiburon*, 447 U.S. 255, 262 (1980), was expressed by Congress in its enactment of the statute authorizing marketing orders. That weighing, delegated to the Secretary, was continued in the promulgation of the Order and subsequent regulations. The evidence in this case indicates that the Department considered the impact of the 1988-89 reserve rule on handlers and concluded that the benefits to the industry (higher prices and improved stability of the market) would compensate for the costs of maintaining the reserve. *See* 54 Fed. Reg. 3587 (January 25, 1989). Only Congress or the Secretary acting in his legislative capacity may now overrule these findings and decisions.

The final question to be addressed is the extent to which the reserve rule interfered with Petitioners' reasonable investment-backed expectations. As in *Monsanto*, 467 U.S. at 1005, this factor overwhelms the others and is, by itself, dispositive of the constitutional issue. . . . Petitioners did have notice that *some* reserve requirements would probably be established. Given Petitioners' awareness that some reserve was likely in 1988-89, as well as their general awareness of the history of reserves under the Order, Petitioners did not have a reasonable basis for investment-backed plans or commitments to market all almonds received in 1988-89. The timing of the reserve rule in this case failed to allow Petitioners to plan operations for the year with perfect certainty of their reserve obligations. However, in the context of this marketing order, mere lack of certainty as to the

precise requirements of the final reserve rule is not a reasonable foundation for concrete marketing plans. Therefore, even if Petitioners had demonstrated the existence of investment-backed expectations of marketing more than 75% of their 1988-89 almonds, the expectations would not have been reasonable.

In sum, upon consideration of the character of the 1988-89 reserve rule, its economic impact and, specifically, the extent to which it interfered with Petitioners' reasonable investment-backed expectations, I conclude that it is not the type of governmental action that is proscribed by the just compensation clause as an unconstitutional interference with property interests.

B. The interpretations by the Almond Board and AMS respecting the actions handlers needed to take to comply with the reserve requirements were valid under the Act and Marketing Order 981.

In a letter to the Board, dated December 14, 1988, AMS stated its position that a contract for the disposition of reserve almonds entered into before the release of the reserve constitutes a sale or consignment and is therefore an act of handling within the meaning of the relevant provisions of the Order. The agency further stated that it considered such transactions to be price-depressing and detrimental to the reserve program. Petitioners maintain that they refrained from entering into contracts for the sale of reserves in deference to the agency's view. Petitioners argue that neither the AMS position, nor the consequent obligation imposed on them to eschew this type of transaction, was in accordance with law.

Petitioners' arguments are unpersuasive. It is well established that an agency's interpretation of its own

regulations is entitled to great weight. *County Line Cheese Co. and Meadow Gold Dairy*, 44 Agric. Dec. 63, 87 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987).

Deference to agency expertise is especially appropriate when the regulations in question are components of intricate, highly technical regulatory programs, such as marketing orders. *See, e.g., Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966); *Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 59-60 (1986) (citing numerous cases in support). Agency interpretations of regulations implementing this type of program are to be upheld on review if they are reasonable. *County Line Cheese Co.*, 41 Agric. Dec. 640, 643-644 (1982). The AMS position on contracts for the future sale of reserve almonds meets this standard.

The formation of a contract for the future sale of almonds is reasonably viewed as placing those almonds into the channels of trade. The term "sale" can reasonably be read as including future sale. Moreover, commitments for future sales of storable agricultural commodities, such as almonds, are known to have substantial intertemporal effects on prices. *See, e.g.*, Peck, *Futures Markets and Intertemporal Commodity Pricing*, in ECONOMIC EFFICIENCY IN AGRICULTURAL AND FOOD MARKETING 256 (R. Kilmer and W. Armbruster eds. 1987). The existence of these economic effects strongly supports the conclusion that contracts for future sales place reserve almonds into the channels of trade.

Agency action is "presumed to be based on facts justifying the specific exercise of . . . delegated authority." *Sequoia Orange Co., et al.*, [*supra*,] 47 Agric. Dec. [at] 87, *citing United States v. Rock Royal Co-op., Inc.*, 307 U.S. at 567-568. Petitioners

have not presented any evidence sufficient to overcome this presumption favoring the Agency's position on contracts for future sales of reserve almonds. Therefore, the Department's position should stand.

Petitioners also challenge the Board's position that reserve almonds must be stored within the State of California. Petitioners maintain that the Board lacks the authority to impose this requirement.

Petitioners' argument is belied by the language of the Order and the realities of administration. Section 981.38 grants the Board the power to investigate violations of the Order and to administer the Order according to its terms. Section 981.70 of the Order provides that each handler's premises shall be accessible to the Board for the examination of almonds. Given the authority granted by these sections, it is proper for the Board to impose ancillary requirements which reasonably control the geographic scope of its oversight activities.

Petitioners have stated that the Board's requirement frustrated their plans to store reserve almonds in West Germany. The monitoring of almonds stored in a distant foreign country would constitute an unjustifiable burden on the Board. Furthermore, the shipment of reserve almonds to West Germany, even if done, as Petitioners urge, to save delivery time in the event that the reserve is released, may reasonably be viewed as an act of selling or consigning. At the very least, such conduct strongly suggests the presence of an underlying sale or consignment contingent upon the release of the reserve. And, as discussed above, entry into arrangements of this type constitutes an act of handling. It would be unreasonable to assume that Petitioners would incur the expenses of leasing warehousing facilities in

West Germany, shipping almonds there, and maintaining them in good condition, if those almonds were not, in fact, committed for sale. In sum, given Petitioners' intention to store reserve almonds in West Germany, I conclude that the Board acted reasonably and within the boundaries of its authority in requiring that reserve almonds be stored within the State of California.

C. The Secretary's rulemaking action setting handler assessments for the 1988-89 crop year was . . . [valid].

Petitioners maintain that the 1988-89 assessment rule is not in accordance with law because (1) it is retroactive, (2) the 10-day comment period used was violative of Departmental Regulation 1512-1 and the Administrative Procedure Act, (3) it became effective on the date of its publication in the *Federal Register* and was therefore violative of the Administrative Procedure Act requirement that its effective date be delayed for 30 days or more after publication, (4) assessments on reserve almonds are unauthorized under the Order, (5) creditable advertising assessments based in part upon reserve tonnage are arbitrary because they force handlers to advertise almonds which may not be sold, and (6) the Department failed to provide a proper statement of the purpose of the rule.

. . . .[3]

Petitioners also challenge the Department's decisions to use a 10-day comment period and to dispense with the requirement of 5 U.S.C. § 553(d) that a

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[3] [The ALJ's holding, that the Secretary's action was not in accordance with law since it was retroactive, is omitted.]

rule take effect no sooner than 30 days after its publication in the *Federal Register*. . . .

However, considered in isolation from the retroactive character of the assessment rule, the Department's choice of comment procedure and effective date is amply supported by the stated rationale. The Department's objective of expediting the promulgation process was a valid one given the fact that almond handling for the crop year had already begun by the time the proposed rule was published.

Moreover, there is no credible evidence that the comment period and effective date of the assessment rule in any way affected the interests of the Petitioners. Petitioners were given a fair opportunity to comment on the rule. As noted by the Department, the Almond Board budget on which the assessment rule was based had been discussed extensively in Board proceedings. *See* 53 Fed. Reg. 43849 (October 31, 1988). Petitioners certainly knew the rate that would be proposed to the Secretary and had ample time even prior to the call for comments to draft their objections. As to the effective date chosen, there is no evidence that Petitioners or others were surprised or suddenly found themselves out of compliance with the rule on October 31, 1988. In the absence of these factors, I find that there was good cause within the meaning of 5 U.S.C. § 553(d) to dispense with the general requirement of delayed effective date. Therefore, I cannot conclude that the Department's decisions to use a 10-day comment period and an effective date coinciding with the date of publication are so defective as to constitute independent grounds for invalidating the assessment rule.

Petitioners also argue that assessments on reserve almonds are unauthorized under the Order. They

further maintain that the fraction of the 1988-89 assessment rate, which is attributable to budgeted creditable advertising expenses (2.5 cents), cannot rationally be applied to almonds that must be withheld from the market. According to Petitioners, this method of computing the amount of their assessment is arbitrary because it effectively forces them to advertise almonds that they are prohibited from selling.

It is the settled agency construction of the Order that all almonds received by a handler during the crop year are assessable. This interpretation is entitled to great weight and must stand if it is reasonable. *County Line Cheese Co. and Meadow Gold Dairy*, 44 Agric. Dec. at 87. Petitioners argue that it is not.

Petitioners urge that considering the Order provisions for assessments and the provisions for reserve withholding *in pari materia* yields the conclusion that reserve almonds are not subject to assessments. 7 C.F.R. § 981.81 provides for assessments on all almonds "received" by a handler "for his own account." However, § 981.52 states that handlers must hold reserve almonds "for the account of the Board." Therefore, Petitioners argue, reserve almonds are not assessable because they are not received by a handler "for his own account."

This interpretation of the Order is incorrect. Although reserve almonds are *held* for the account of the Board, those almonds are initially *received* by a handler for his own account. The quantity of almonds that a handler must set aside as reserve is calculated as a percentage of all almonds that he receives for his own account. *See* 7 C.F.R. § 981.50. Therefore, reserve almonds that are held for the account of the Board were necessarily first received by the handler

for his own account. Almonds acquire reserve status *based upon* their receipt by the handler for his own account. For this reason, the quantity of almonds received by a handler for his own account necessarily includes any fractional part of that quantity that is thereafter set aside to satisfy the handler's reserve obligation.

Furthermore, the intent of the Order to include reserve almonds in the category of assessable almonds is clearly expressed in the original Notice of Recommended Decision. The Notice states in part:

> The order should provide that all handlers shall pay an assessment . . . per pound of edible kernels received by them for their own accounts (except receipts from other handlers on which assessments have been paid), whether salable or surplus [i.e., reserve], during the crop year.

15 Fed. Reg. 3639 (June 9, 1950). This language, together with the logical structure of the Order provisions discussed above, nullifies Petitioners' argument against the levying of assessments on reserve almonds.

Petitioners also suggest that the levy on reserve almonds violates the requirement of the Act that assessments reflect each handler's pro rata share of expenses. *See* 7 U.S.C. § 610(b)(2)(ii). This is also incorrect. Assessments on reserve almonds do not affect the equity of the levy, since the reserve scheme requires every handler to withhold a uniform percentage of all almonds he has received for his own account in a given crop year.

Petitioners next urge that levying assessments on reserve almonds effectively forces handlers to advertise almonds that they may not sell. This argument

apparently assumes that the Act or Order requires some specific relationship between budgeted advertising expenses and the volume of almonds made available for sale in a given crop year. There is no such requirement. Nor is there any linkage between specific budget items and the formula used to ensure equitable distribution of the *total* financial burden of the Order among all handlers.

The advertising program under the Order is intended to effectuate the Act's policy of improving returns to growers by increasing the demand for almonds. Although the Department has expressed belief that advertising generally aids the entire industry, 53 Fed. Reg. 43,849 (October 31, 1988), the creditable advertising program is properly viewed as requiring handlers to contribute pro rata to a program designed primarily to benefit another segment of the industry—the almond growers. It is therefore incorrect to analyze a given handler's advertising obligation in terms of its relationship to specific benefits which he might realize as a result. Congress has authorized the establishment of handler advertising programs "designed to assist, improve, or promote the marketing, distribution, and consumption" of almonds. *See* 7 U.S.C. § 608c(6)(I). And the application to reserve almonds of the creditable advertising assessment rate is simply the method chosen to equitably apportion the burden of this program among the handlers in the industry. As previously stated, differential economic effects generated by a marketing order are not necessarily fatal to its validity.

Even assuming, *arguendo*, a linkage between advertising assessments and specific benefits to handlers, assessments on reserve almonds do not necessarily

force handlers to advertise almonds which they may not sell. Reserves may be, and frequently are, reduced or released completely in response to new analyses of trade demand. Thus, the advertising dollars which petitioners characterize as corresponding to almonds held in reserve in fact corresponded to salable almonds after the 1988-89 reserve was released on July 31, 1989. *See* 54 Fed. Reg. 31502 (July 31, 1989). Moreover, it is not unreasonable to assume that advertising which raises demand in the course of a crop year may increase the prospects that the reserve in force for that year will be reduced or eliminated, enhancing the marketability of the affected almonds. Petitioners' argument also ignores the possibility that advertising has cumulative, long-term effects upon demand. In sum, petitioners' contention reflects a fundamental misunderstanding of the purposes and effects of the handler advertising program. It is rejected for each of the reasons discussed above.

Petitioners' final objection to the assessment rule focuses upon the Department's statement of basis and purpose. Petitioners maintain that the Department failed to discuss with sufficient specificity the reasons for its adoption of the Board's recommended budget. This argument is unavailing.

It is established beyond doubt that the marketing order program is a cooperative venture between the Secretary and the various commodity industries. *See, e.g., Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). Under normal circumstances, the Secretary does not substitute his judgment as to the best means of marketing a crop for that of the industry. *Sequoia*, 47 Agric. Dec. at 187. And, as noted above, selection of

the specific means of effectuating the declared policy of the Act is within the discretion of the Secretary.

Petitioners have not shown that the Secretary failed to consider all relevant factors before adopting the budget recommendation of the Board. *See Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). In its discussion of the final assessment rule, the Department clearly stated its finding that the rule adopting the recommendation of the Board would tend to effectuate the declared policy of the Act. In its response to comments on the advertising budget, the Department specifically declared its belief that advertising and market promotion activity "benefits all handlers and growers by increasing demand for all almonds." 53 Fed. Reg. 43849 (October 31, 1988). Petitioners have presented no credible evidence which would tend to show that the Department's position is arbitrary, capricious, or unreasonable. They have failed to demonstrate the absence of "a rational connection between the facts found and the choice made." *Sequoia*, 47 Agric. Dec. at 90, quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). I therefore conclude that the statement of basis and purpose issued in support of the assessment rule is not so defective as to constitute an independent basis for invalidating the rule.

D. The Almond Board's act of placing an informational newspaper advertisement imposed no legal obligation upon petitioners and is therefore not reviewable in this proceeding.

Petitioners also attack, as unauthorized, the Board's act of placing a newspaper advertisement informing growers of their obligations under the Order

should they engage in acts of handling. The use of news media to assist the industry by disseminating accurate information as to possible Order requirements is well within the Board's authority to administer the Order. The advertisement was not misleading nor did it create any legal obligation. Because it did not create an obligation binding upon petitioners or others, I conclude that the Board's act of placing the advertisement is not reviewable in this proceeding.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners' appeal consists, in the main, of a restatement of the arguments made before the ALJ, and correctly decided by the ALJ. No further discussion of these issues is necessary.

Petitioners seek a specific statement by the Judicial Officer as to the availability of damages in a § 8c(15)(A) proceeding. I agree with the ALJ's views, in this respect, which I omitted because of disagreement with other matters. The ALJ's views with which I agree are as follows (Initial decision at 22 n. 1):

> It should be noted that in proceedings under section 8c(15)(A) of the Act, the assessment of monetary damages is not authorized, and the extent to which Petitioners have been damaged is not an issue that may be considered in that context. Petitioners' change of economic position in anticipation of a 25% reserve rule is, however, relevant to their claims under the just compensation clause of the fifth amendment. (See discussion of this issue, *infra*.)

My views as to damages are set forth at greater length in *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23, slip op. at 98-105, 115-16, 122, 148-52, 166-67 (Jan. 23, 1991), *appeal docketed*, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), which is attached as an Appendix to this decision.

As to the ALJ's holding that the Secretary's rulemaking action, setting handler assessments for the 1988-89 crop year, was not in accordance with law since it was retroactive (Initial Decision at 34-35), I disagree for the reasons set forth in *Saulsbury, supra*, at 152-67.[4] *See also Saulsbury, supra*, at 132-52.

My views that the Secretary's rulemaking action setting handler assessments for the 1988-89 crop year was not invalid retroactive action are equally applicable to the issue as to whether the Secretary's rulemaking action, requiring handlers to withhold and reserve 25% of the almonds handled during the 1988-89 crop year, was invalid retroactive action. In this respect, I am in agreement with respondent's appeal petition, which states (Appeal Petition at 11-14):

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[4] Here, as in *In re Cal-Almond, Inc.*, 50 Agric. Dec. 171, slip op. at 16 n. 7 (Feb. 28, 1991), although *Cal-Almond, Inc.*, is a petitioner in the present case and in *Saulsbury*, it makes no difference whether *res judicata* or *stare decisis* is applicable to *Cal-Almond's* claims.

II. THE ESTABLISHMENT OF THE RESERVE AND SALABLE PERCENTAGES FOR THE 1988-89 CROP YEAR WAS NOT RETROACTIVE AND WAS IN ACCORDANCE WITH LAW.

For the same reasons as discussed above, the Judge's decision that the reserve rule is unlawful to the extent that a reserve percentage was imposed upon almonds handled prior to the promulgation of the final reserve rule is erroneous. This rule operates prospectively, and was not promulgated in violation of the APA or the Act.

The Act provides that the Secretary has the authority to issue regulations which establish and maintain orderly marketing conditions, and states that it is the policy of Congress to provide an orderly flow of supply to avoid unreasonable fluctuations in supplies and prices. 7 U.S.C. § 602. In order to effectuate this policy, the Secretary promulgated volume regulations in the Almond Order. Pursuant to formal rulemaking proceedings, regulations have been issued that impose handling restrictions on almond handlers. These regulations provide that a salable and a reserve percentage shall be established during a crop year when the Secretary determines, from information supplied by the Board and by other information, that a reserve would tend to effectuate the policy of the Act. 7 C.F.R. § 981.46-.47. The regulations provide that the Secretary shall consider such factors as the ratio of estimated trade demand to the estimated production of marketable almonds, or the allocation quantity of almonds, whichever is applicable. 7 C.F.R. § 981.47. This rule setting forth the *procedure* for the establishment of a reserve operates prospectively only.

The regulations further provide that the Secretary may decrease the reserve amount as he obtains revised crop estimates, or as supply or demand conditions change. This may be done during the crop year. 7 C.F.R. § 981.48. The regulations further provide that the Board shall furnish the Secretary with the necessary and most current market information, and shall recommend a proposed salable and reserve percentage by August 1 of the pertinent crop year. 7 C.F.R. § 981.49. In order to consider all of the necessary information, the Secretary must promulgate the reserve rule during the crop year to be regulated.

A proposed rule was published in the Federal Register on September 16, 1988, that gave notice of a proposal to establish salable, reserve, and export percentages of 75%, 25%, and 0% respectively, for almonds received by handlers during the 1988-89 crop year. 53 F.R. 36051 (1988). This proposed rule for salable and reserve percentages was based upon a recommendation of the Board and upon other available market information for the 1988-89 crop year (53 F.R. 36052), and the Secretary found that this rule would tend to effectuate the declared policy of the Act. He therefore issued a final rule establishing salable and reserve percentages on January 25, 1989, to take effect 30 days after the date of publication. 54 F.R. 3584 (1989).

No handler was legally obligated to withhold from handling a reserve percentage before a reserve percentage rule was promulgated. Therefore, neither the rule establishing the procedure for determining the reserve percentage, nor the actual rule establishing a reserve percentage, is unlawfully retroactive, as the Judge found in his Decision below.

The Supreme Court in *Bowen* determined that the rule in question was not authorized by the Medicare Act. It did not reach the question of whether the rule violated the APA. The Act in this case gives abundant authority to the Secretary to issue rules that maintain orderly marketing conditions, and states that it is the policy of Congress to allow the Secretary discretion to promulgate regulations to effectuate this purpose. *See* 7 U.S.C. 608c(6)(E). Pursuant to this authority, the Secretary has established a scheme that will control harmful market fluctuations in the California almond industry by the restriction of the handling of almonds at certain times. Therefore, the reserve program is not in violation of the Act.

Additionally, the reserve rules are not in violation of the APA, which provides that rules should have future effect. 5 U.S.C. § 551(4). Unlike *Bowen*, no almond handler's rights were affected by a change in policy or procedure. No handler was injured or could reasonably be expected to be injured by acting in reliance [on] a prior rule. In fact, the handlers knew in July of 1988 that there was a strong possibility that a reserve percentage would go into effect for the 1988-89 crop year, because a reserve percentage of 25% had been recommended to the Secretary by the Board. As stated in Justice Scalia's concurrence in *Bowen*, this rule did not alter the *past* legal consequences of past actions, and therefore it was not illegally retroactive. *Supra*, at 477.

As found in *Chemical Waste* [*Management, Inc. v. EPA*, 869 F.2d 1526 (D.C. Cir. 1989)], the fact that a regulation imposes a future liability on past actions does not render it retroactive. *Supra*, at 1536. The reserve rule does not regulate past activity. Instead,

it establishes a prospective reserve requirement using all almonds handled in the crop year in the calculation. In simplest terms, no handler would be retroactively held liable for failure to maintain the 25% reserve during the 1988-89 season before the reserve requirement was made effective on February 25, 1989. 54 F.R. 3584 (1989).

The Secretary carefully evaluated the Almond Board's recommendation in light of current marketing conditions, and issued a rule as promptly as possible under the circumstances. He found that a reserve of 25% of all almonds handled that crop year necessary to effectuate the declared purpose of the Act by regulating market fluctuations and maintaining prices for almonds. As established in the rulemaking proceeding establishing the reserve provisions of the Order, it is necessary for this rule to consider all almonds handled during the crop year in order to further Congressional policy, and impose restrictions on all handlers equally. Thus, the reserve rule was not unlawfully retroactive. To the extent that it has retroactive tendencies, as stated previously, it is clearly authorized by and is not in violation of the Act.

For the foregoing reasons, the following order should be issued.

Order

The relief requested by petitioners is denied and the petitions are dismissed.

APPENDIX

In re Saulsbury Orchards & Almond Processing, Inc., 50 Agric. Dec. 23 (Jan. 23, 1991), *appeal docketed*, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991).

APPENDIX L

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-17160, 94-17163,
94-17164, 94-17166,
94-17167, 94-17182

D.C. Nos. CV-91-0064-REC,
CV-91-0122-REC, CV-91-0123-REC,
CV-91-0685-REC, CV-92-5684-REC,
AND CV-86-0087-REC

CAL-ALMOND, INC., A CALIFORNIA CORPORATION;
SAULSBURY ORCHARD AND ALMOND PROCESSING INC.;
CARLSON FARM, A SOLE PROPRIETORSHIP,
PLAINTIFFS-APPELLEES

v.

DEPARTMENT OF AGRICULTURE,
DEFENDANT-APPELLANT

[FILED: FEB. 20, 1996]

ORDER

Before: CHOY, SCHROEDER, and BRUNETTI,
Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Schroeder and Brunetti vote to reject the suggestion for a rehearing en banc and Judge Choy so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX M

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* provides, in pertinent part:

* * * * *

§ 608a. Enforcement of chapter

* * * * *

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any pro-ceeding now pending or hereafter brought in said courts.

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the

Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing or other processing), hops, honeybees and naval stores as included in the Naval Stores act [7 U.S.C. 91 *et seq.*] and standards established

thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghum, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing[1] and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and

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[1] So in original. Probably should be followed by a comma.

have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for purposes of subsection (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence

introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any specified grade, size, or quality thereof, produced during any period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during specified period of periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the

Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or

product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more of a combination of the following: The total quantity of hops available or estimate will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting

yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15) U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i).

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates,

plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from the State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, or an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears

for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

* * * * *

(15) Petition by handler for modification of order or exemption: court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for the purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the

Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

* * * * *

§ 610. Administration

* * * * *

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, when in his judgement they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary,

in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(2)(i) Each order relating to milk and its products issued by the Secretary under this chapter shall provide * * *

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate and for the maintenance and functioning of such authority or agency, other than expenses occurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under

a marketing agreement of marketing order throughout the period the marketing agreement or order is in effect and irrespective or whether particular provisions thereof are suspended or become inoperative.

(iii) Any authority or agency established under an order may maintain in its own name, or in the name of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) Regulations; penalty for violation

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * *

APPENDIX N

Title 7 of the Code of Federal Regulations (1992) provided, in relevant part:

PART 981 — ALMONDS GROWN IN CALIFORNIA

* * * * *

§ 981.30 Establishment.

A Board of ten members, with an alternate member for each such member, is hereby established.

* * * * *

§ 981.38 Powers.

The Board shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To receive, investigate and report to the Secretary complaints of violations of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 981.39 Duties.

The Board shall have, among other things, the following duties:

(a) To act as intermediary between the Secretary and any handler or grower;

(b) To keep minute books and records which will clearly reflect all of its acts and transactions, and such minute books and records shall be subject to examination by the Secretary at any time;

(c) To investigate the growing, shipping, and marketing conditions with respect to almonds and to assemble data in connection therewith;

(d) To furnish to the Secretary such available information as may be deemed pertinent or as he may request;

(e) To appoint such employees as it may deem necessary and to determine the salaries, define the duties and fix the bonds of such employees; and

(f) To cause the books of the Board to be audited by one or more competent certified public accountants at least once for each crop year, and at such other times as the Board may deem necessary or as the Secretary may request; and the report of each such audit shall show, among other things, the receipt and expenditure of funds pursuant hereto: and to file with the Secretary three copies of all audit reports made.

§ 981.40 Procedure

(a) *Organization and rules.* The members of the Board shall select a chairman from their membership. The Board shall select such other officers and adopt such rules for the conduct of its business as it may deem advisable. The Board shall give to the Secretary or his designated agent and representatives the same notice of meetings of the Board as is given to members of the Board.

* * * * *

(d) *Right of the Secretary.* The members of the Board (including successors or alternates), and any agent or employee appointed or employed by the Board, shall be subject to removal or suspension by the Secretary at any time. Each and every order, regulation, decision, determination, or other act of the Board shall be subject to the continuing right of the Secretary to disapprove of the same act at any time, and, upon such disapproval, shall be deemed null and void except as to acts done in reliance thereon or in compliance therewith.

(e) *Additional voting requirements.* Adoption of recommendations by the Board with respect to projects pursuant to § 981.41 involving production research, marketing research and development projects, and marketing promotion including paid advertising and crediting the pro rata expense assessment obligation of handlers with such portion of their direct expenditures for marketing promotion including paid advertising, shall require at least seven affirmative votes.

§ 981.41 Research and development.

(a) *General.* The Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development projects, and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a

handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized. The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) or credited pursuant to paragraph (c) of this section.

(b) *Authorization.* If, on the basis of a Control Board recommendation pursuant to § 981.40(e) with respect to projects pursuant to this section, and appertaining rules and regulations established by the Secretary on recommendation of the Board, and other available information, the Secretary concurs that such activities should be permitted, he shall authorize such activities.

(c) *Creditable expenditures.* The Board, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising. Such expenditures may include, but are not limited to, money spent for advertising space or time in newspaper, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent: *Provided*, That with respect to paid advertising, advertising production costs, preparation expenses, travel allowances, and other expenses not directly connected with paid space or time, and costs relating to pretesting of advertising, test marketing, directory advertising, point of sales materials, premiums, and trade pro-

motion allowances shall not be eligible for credit against a handler's assessment obligation.

(d) *Promotion guidelines.* All marketing promotion activity engaged in by the Board, including paid advertising, shall be subject to the following terms and conditions:

(1) No marketing promotion, including paid advertising shall refer to any private brand, private trademark or private trade name;

(2) No promotion or advertising shall disparage the quality, use, value, or sale of like or any other agricultural commodity or product, and no false or unwarranted claims shall be made in connection with the product;

(3) No promotion or advertising shall be undertaken without reason to believe that returns to producers will be improved by such activity; and

(4) Upon conclusion of each activity, but at least annually, the Board shall summarize and report the results of such activity to its members and to the Secretary.

(e) *Rules and regulations.* Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

* * * * *

§ 981.80 Expenses.

The Board is authorized to incur such expenses as the Secretary may find are reasonable and likely to be incurred by it during each crop year, for the maintenance and functioning of the Board, including the accumulation and maintenance of an operating reserve fund, and for such purposes as the Secretary may, pursuant to the provisions of this subpart, determine to be appropriate. The recommendation of the Board as to the expenses for each such year, together with all data supporting such recommendation, shall be submitted to the Secretary on or before August 1 of the crop year in connection with which such recommendation is made.

§ 981.81 Assessment.

(a) *Requirement for payment.* Each handler shall pay to the Board on demand by the Board, from time to time, such sum less any amounts credited pursuant to § 981.41, based on such rate per pound of almonds, kernel weight basis, received by him for his own account (except as to receipts from other handlers on which assessments have been paid) as the Secretary finds is necessary to provide funds to meet the authorized board expenses and the operating reserve requirements, and establishes for the crop year. Upon redetermination of the kernel weight of almonds received by handlers for their own account as provided in § 981.61, such redetermined kernel weight for each handler, adjusted for receipts on which assessments have been paid, shall be the basis upon which he shall pay assessments. At any time during or after a crop year, the Secretary may increase the rate of assessments to apply to all such almonds

during such crop year to secure sufficient funds to cover the expenses authorized by § 981.80 or by any later finding by the Secretary relative to the expenses of the Board, and such additional assessments shall be paid to the Board by each handler on demand. The payment of assessments for the maintenance and functioning of the Board may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

* * * * *

§ 981.441 Crediting for marketing promotion including paid advertising.

(a) In order for a handler to receive credit for his marketing promotion expenditures, including paid advertising, against his pro rata expense assessment obligation pursuant to § 981.41(c), the Board shall determine that such expenditures meet the applicable requirements of this section.

(b) Each paid advertisement must be published, broadcast, or displayed and other marketing promotion activities must be conducted during the crop year for which credit is requested, except that a handler may receive credit up to a maximum of 40 percent of his total creditable advertising and promotion obligation as of the June 30 redetermination report for expenditures made for advertisements published, broadcast, or displayed and other marketing promotion activities conducted no later than December 31 of the subsequent crop year. A handler utilizing this extension shall: (1) File any required documentation with the Board no later than the

following January 31, and (2) certify to the Board, at the time of the June 30 redetermination, his planned expenditures during the extension period.

(c) The following requirements shall apply to crediting for paid advertising:

(1) Credit granted by the Board for paid advertising shall be that which is appropriate when compared to the applicable outlet rate published in the domestic or Canadian catalogs of Standard Rate and Data Service or station, publisher, or outdoor rate cards. In the case of claims for credit not covered by any such source, the Board shall grant the claim if it is consistent with rates for comparable outlets. For advertisements in markets other than the United States and Canada, paragraph (c)(4) of this section shall apply.

(2) The clear and evident purpose of each advertisement shall be to promote the sale, consumption, or use of California almonds, and nothing therein shall detract from this purpose.

(3) Credit for paid advertising shall be granted:

(i) For 100 percent of a handler's payment to an advertising medium:

(A) For a generic advertisement of California almonds;

(B) For an advertisement of the handler's brand of almonds;

(C) When either of these advertisements includes reference to a complementary commodity or product;

(D) For a trade media advertisement that displays branded food products containing almonds, or announces a handler's future promotion activities, including joint promotions, and the entire expenditure is borne by the handler;

(E) For in-store supermarket advertisements using fixed position, video media, or light emitting diode (LED) signs, when such payments are made through an advertising firm or company which specializes in the production of LED advertisements and the placement of those advertisements: (*1*) Fixed position advertisements must include one or more of the following: (*i*) Processed color displays enclosed in plastic frames and mounted on supermarket shopping carts; (*ii*) overhead directories enclosed in frames placed at the end or middle of supermarket aisles; or (*iii*) processed color advertisements enclosed in frames and mounted on a supermarket shelf; (*2*) Video advertisements must be shown on a fixed video monitor running television commercials or infomercials for specific products on a rotating basis; (*3*) LED advertisements must be shown on an in-aisle LED screen running specific product messages on a rotating basis; or

(F) For processed color displays enclosed in frames mounted on fixtures outside and in front of retail food stores when payments are made through an advertising firm.

(ii) For an advertisement resulting from joint participation by a handler and a manufacturer or seller of a complementary commodity or product, and including the brands of both, the credit shall be 50 percent of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iii) For an advertisement resulting from joint participation by a handler and manufacturers or sellers of two complementary commodities or products, and including the brands of all three, the credit shall be one-third of the total allowable

payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iv) When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50 percent raw shelled almonds by weight, and (C) the almond product displays the handler's brand and: *Provided further*, That, if the product is advertised with forms of almonds for which 100 percent credit is allowed, the advertisement shall receive 100 percent credit provided it meets the criteria of paragraph (c)(3)(iv) (A), (B), and (C) of this section. With respect to almond butter advertising, the credit shall be 100 percent of the total allowable payment to the advertising medium or 100 percent of the handler's payment thereof, whichever is less. For the handler to receive credit, the almond butter must meet the specifications contained in § 981.466, and the handler's brand must be displayed.

(4) Credit for media expenditures in a foreign market shall be granted:

(i) For handlers' unreimbursed media expenditures for advertising in any foreign market pursuant to a contract with the Foreign Agricultural Service, U.S. Department of Agriculture, and/or the California Department of Food and Agriculture, provided the advertisements meet the requirements of paragraphs (c)(2) and (3) of this section and the limitations of paragraphs (c)(5)(i) and (ii) of this section. Such advertising in foreign markets shall not be creditable unless the handler certifies on ABC Form 31 that

said handler was not and will not be reimbursed for such advertising by the Foreign Agricultural Service or the California Department of Food and Agriculture and submits to the Board copies of all claims for reimbursement filed with the Foreign Agriculture Service and/or California Department of Food and Agriculture.

(ii) For a handler's media expenditures for brand advertising in any country where California almonds are sold, credit shall be allowed when claims are substantiated by applicable rate cards. The provisions of this section applicable to domestic advertising shall also apply to the crediting of advertising in these markets.

(5) Credit granted a handler shall be subject to other conditions as follows:

(i) No credit shall be granted to a handler when more than two complementary branded products are included in an advertisement.

(ii) Advertisements which, in addition to promoting California almonds, also mention or promote the sale of noncomplementary commodities or products, or of competing nuts, shall not be eligible for credit.

(iii) Advertisements which direct consumers to one or more named retail outlets, other than handler operated, shall not be eligible for credit.

(6) A handler must file a claim with the Board to obtain credit for an advertising expenditure. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that documentation will be submitted

as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance as follows:

(i) For published advertisements, submit a copy of the publication, invoice, agency invoice, if any, and tear sheet of the advertisement.

(ii) For radio advertisements, submit a copy of the station invoice, a copy of the script, or reference to a copy on file with the Board, and the agency invoice, if any.

(iii) For television advertisements, submit a copy of the station invoice, a copy of the script and tape or story board of the advertisement, or a reference to these in the Board files, and the agency invoice, if any.

(iv) For outdoor advertisements, submit a copy of the company invoice, a photograph of the display or a reference to a photograph in the Board files, and the agency invoice, if any.

(v) For in-store supermarket advertising and for mounted advertising enclosed in frames outside and in front of retail food stores, submit a copy of the company invoice, a copy of the actual advertisement or video tape, a published rate card from a nationally recognized company, and a copy of the agency invoice, if any.

(vi) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in § 981.41(c). The Board shall advise the handler promptly of the extent to which such claim has been allowed.

(d) The following requirements shall apply to crediting for marketing promotion other than paid advertising:

(1) Credit for marketing promotion expenditures shall be granted:

(i) For the distribution of sample packages containing one-half ounce or less of almonds to charitable or educational outlets. For the purpose of this section, the term *charitable outlet* means an organization to which a charitable contribution as defined in section 170(c) of the Internal Revenue Code (26 U.S.C. 170(c)) may be made. Such sample packages shall be packed for the Board under its generic label and sold to the distributing handlers at the price paid for them by the Board. Credit shall be based on the price a handler pays the Board for such packages and upon receipt by the Board of acceptable proof of distribution. Such sample packages may or may not be personalized with an individual handler's label. Credit applicable to the distribution of sample packages shall be subject to the following conditions:

(A) A handler may receive credit for 150 percent of the purchase price of such packages against the creditable assessment obligation incurred on the first 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(B) A handler may receive credit for 100 percent of the purchase price of such packages against the creditable assessment obligation incurred on the section 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(C) No credit shall be granted in excess of the creditable assessment obligation incurred on 8,000,000 redetermined kernel weight pounds received by a handler during a crop year.

(D) No credit shall be granted for sample packages distributed to market segments where almonds are already being sold. Handlers shall obtain approval from the Board prior to distribution to ensure that this condition is met.

(E) No credit shall be applicable to the distribution of sample packages in outlets where they will be used for resale.

(F) Handlers must place written orders for sample packages with the Board no later than February 1 of any crop year except to the extent that handlers use the deferment provision found in paragraph (b) of this section: *Provided*, That for the 1988-89 crop year, handlers must place written orders no later than March 5, 1989. Handlers must place written orders for sample packages with the Board no later than August 15 of any crop year to receive credit for up to 40 percent of their creditable assessment obligations when using the deferment provision pursuant to paragraph (b) of this section.

(G) Handlers must file claims with the Board in order to receive credit for distribution of sample packages. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of distribution will be submitted as expeditiously as possible, but no later than October 15. If this pre-

liminary claim is not filed or or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC From 31 and accompanied by appropriate proof of performance. This proof shall consist of a signed statement from the organization to which sample packages were distributed, on that organization's letterhead, stating:

(1) The name and address of the handler from whom the packages were received;

(2) The date of receipt;

(3) The volume of packages received;

(4) How such packages will be used;

and

(5) A statement that such packages will not be used for resale.

(ii) For promotion materials available from the Board and sold to handlers at the price paid for them by the Board. Credit shall be granted for the amount a handler pays the Board for such materials upon purchase. Such materials may or may not be personalized with the label of any individual handler.

(iii) For costs directly related to mail order promotion subject to the follow conditions;

(A) Credit shall only be granted for the following expenditures;

(*1*) For the purchase of mailing lists to conduct mail order promotions.

(*2*) For the cost of envelopes and postage to mail promotional materials.

(B) Credit for mail order promotion shall be limited to a total of $25,000 or 25 percent of a handler's creditable assessment per crop year, whichever is greater.

(C) Handlers must file claims with the Board in order to receive credit for mail order promotion

expenditures. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of performance will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proofs of performance such as invoices or postal receipts.

(e) Credit shall be granted for payments made to the Board for use by the Board for generic marketing promotion including paid advertising subject to the following conditions:

(1) A handler may receive credit for 150 percent of a payment made to the Board against creditable assessment obligation.

(2) When a handler elects to use this method of crediting for all or a portion of such handler's assessment obligation, the handler may use the extension provided for pursuant to paragraph (b) of this section for handler's deferred advertising and promotion obligation.

(3) Handlers must file claims with the Board on ABC Form 31 in order to receive credit for payments made to the Board. No credit shall be granted unless a claim is filed on or before January 31 of the then current crop year: *Provided*, That for the 1988-89 crop year for claims not previously filed on or before January 31, 1989, a claim or supplementary claim

must be filed with the Board on ABC Form 31 on or before March 31, 1989. Payments must be made as follows: One-fourth of total claim on or before January 31; one-fourth on or before March 31; one-fourth on or before May 31; and one-fourth on or before June 30 of the then current crop year: *Provided*, That for the 1988-89 crop year, payments not previously made on or before January 31, 1989 must be made as follows: One-third on or before March 31, 1989; one-third on or before May 31, 1989; and one-third on or before June 30, 1989. If the entire amount of the claim is not paid by June 30, or if a handler fails to meet any payment deadline of this paragraph credit for payment shall revert to the 100 percent basis.

Supreme Court, U.S.
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No. 95-1879

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioner,

vs.

CAL-ALMOND, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

BRIAN C. LEIGHTON
Counsel of Record
701 Pollasky Avenue
Clovis, California 93612
(209) 297-6190

JAMES A. MOODY
2300 "N" Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9011

Attorneys for Respondents

9046
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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PARTIES TO THE PROCEEDINGS

The petitioner is the United States Department of Agriculture, which was the defendant below. The Respondents, which were the plaintiffs below, are Cal-Almond, Inc., Carlson Farms, Gold Hills Nut Company, Inc., Gourmet Packing, Inc., Frazier Nut Farms, Inc., and Ellen Briones, Chapter 7 Trustee in Bankruptcy for Saulsbury Orchards and Almond Processing, Inc.

None of the Respondents have any parent companies nor any subsidiaries nor do any of them issue shares of stock to the public. (Supreme Court Rule 29(6)).

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APPENDIX

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Respondents respectfully oppose the petition for writ of certiorari, and pursuant to Supreme Court Rule 15.2, direct the Court to misstatements of fact and/or law in the petition that bears on what issues properly should be before the Court if certiorari were granted.

OPINIONS BELOW

The initial opinion of the Court of Appeals for the Ninth Circuit which addressed and resolved the First Amendment question presented in the petition is *Cal-Almond, Inc., et al. v. USDA*, and is contained in the Solicitor's Appendix (hereinafter "SOL App."), (SOL App. D, 49a) and is reported at 14 F.3d 429 (hereinafter *Cal-Almond I*). Following a remand by the Ninth Circuit Court of Appeals to the District Court for a determination of the remedy, the matter proceeded once again to the Ninth Circuit regarding only the remedial issue. That opinion is contained in SOL App. A beginning at p. 1a. It is reported at 67 F.3d 874 (hereinafter *Cal-Almond II*).[1]

Following the Ninth Circuit's decision in *Cal-Almond I* the government sought rehearing as to the First Amendment issue, and the Ninth Circuit denied the government's petition for rehearing on April 5, 1994. (Resp. App. A).

The other opinion of importance herein is the Ninth Circuit

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1. Respondents in this case have filed a petition for writ of certiorari from the *Cal-Almond II* decision to the extent the Ninth Circuit denied a refund of assessments "paid to third parties" as being barred by sovereign immunity. That petition for writ of certiorari was filed on May 20, 1996 and placed on the Docket June 10, 1996 as No. 95-1978 (the delay in docketing was as a result of Respondents' counsel of record not yet having been admitted to the Supreme Court. Respondents' counsel of record was, by a separate order of the Court, subsequently admitted to practice before the Supreme Court).

Court of Appeals decision in *Wileman Bros. & Elliott, Inc., et al. v. Espy*, which is reported at 58 F.3d 1367 (1995) wherein the Secretary has filed a petition for writ of certiorari, No. 95-1184 which was granted on June 3, 1996 (hereinafter "*Wileman* decision").

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals in *Cal-Almond II* was entered on October 10, 1995, and Respondents' petition for rehearing was denied on February 20, 1996. (SOL App. L). The Solicitor claims jurisdiction in this case to be invoked under 28 U.S.C. § 1254(1). Title 28 U.S.C. § 2101(c) requires that a petition for writ of certiorari be filed within 90 days after entry of such judgment or decree. (*See also*, Supreme Court Rule 13.1). Respondents contend that the Solicitor has filed its petition for a writ of certiorari out of time, since it is not seeking review of the remedial decision of the Ninth Circuit in *Cal-Almond II* which was final on February 20, 1996, but from the First Amendment decision in *Cal-Almond I* which was final, as result of the denial of the government's petition for rehearing, on April 5, 1994. (Resp. App. A).

The jurisdictional argument will be discussed below under **ARGUMENT**.

SUMMARY OF ARGUMENT

1. This Court does not have jurisdiction over the Solicitor's petition for writ of certiorari in this case because the final judgment of the Ninth Circuit Court of Appeals relative to the issues presented by the Solicitor in this case was on April 5, 1994. The Solicitor is not seeking review from the *remedial* decision rendered by the Ninth Circuit Court of Appeals in *Cal-Almond II* which was final on February 20, 1996. The *remedial* decision did

not at all decide whether or not the Almond Marketing Order's compelled expenditures for promotion and advertising violated the First Amendment, as that First Amendment issue was decided on December 22, 1993 and final for purposes of filing a petition for writ of certiorari when the government's petition for rehearing was denied on April 5, 1994. (Resp. App. A).

The Solicitor is attempting to bootstrap the final judgment of the Ninth Circuit with respect to the remedial determination issued on February 20, 1996 (SOL App. L) as the beginning of the 90 day clock, but the Solicitor is not at all challenging the remedial decision in its petition for writ of certiorari. It is only challenging the judgment in *Cal-Almond I* that the Almond Marketing Order's generic advertising program violated the First Amendment rights of Respondents. 28 U.S.C. § 2101(c) requires that review shall be taken or applied for "within 90 days after the entry of judgment or decree." Rule 13.1 of the Rules of the Supreme Court likewise require that a petition for a writ of certiorari to review a judgment issued by any United States Court of Appeals be filed within 90 days after entry of the judgment. The judgment sought to be reviewed herein is the one issued by the Ninth Circuit in *Cal-Almond I*, not *Cal-Almond II*. Therefore the petition is not timely.

2. Rule 15.2 of the Rules of the Supreme Court states that any opposition to a petition for certiorari should address any "perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted."

In this case, the Solicitor notes on several occasions that the Almond Marketing Order program at issue here was distinctly different than the Peach, Plum and Nectarine Order (hereinafter "Treefruit Order") determined in *Wileman*. (For example, Petition at pp. 13-16, and accompanying footnotes). The

Solicitor General stated the same thing in its petition for certiorari in *Wileman* (at 24, fn. 16). In *Wileman*, the Solicitor General stated that it did not "petition for a writ of certiorari in *Cal-Almond* because the Ninth Circuit's decision there was based in part on specific features of the regulations establishing the generic advertising program for almonds as to which the Secretary was considering significant amendments at the time of the Ninth Circuit decision." (Solicitor's Brief at 24, fn 16 in *Wileman*).

Acknowledging the distinct differences between the pure generic promotion and advertising program in Treefruit (mandatory assessments wherein the Board made up of competitors advertises and promotes Treefruit over the Respondents' objections therein) and for almonds where the generic promotion program was a very small feature of it, but a critical feature being that a large portion of the assessments were required to be spent by the Respondents pursuant to severe restrictions that were worthless to the Respondents and designed to benefit the Respondents primary competitor, Blue Diamond, Inc. (*see* Solicitor's Petition at pp. 13-15 and accompanying footnotes). The Solicitor requests this Court — not to hear this matter, thus precluding the Respondents from fully briefing it and orally arguing it — but to hold it in abeyance and dispose of it "as appropriate in light of the disposition of the petition for a writ of certiorari [in *Wileman*]". (Solicitor's Brief at 17).

The Solicitor acknowledges (Brief at 16) that "there is no continuing importance to the manner in which the First Amendment applies to the particulars of the former creditable advertising regulation and the marketing order for California Almonds." The petition also states that "*Wileman Bros.* provides a more appropriate vehicle for resolution of the First Amendment issues than does this case." *Id.* Respondents allege that: (1) the petition for writ of certiorari should either be denied because it

does not satisfy any of the certiorari criteria appearing in Supreme Court Rule 10.1 (or this Court has no jurisdiction because it was filed out of time); (2) or certiorari should be granted so as to allow the Respondents the ability to fully brief the unique issues and facts regarding the Almond Marketing Order and for oral argument, instead of being treated as though it is the forgotten stepchild; and/or (3) any review in *Cal-Almond* should be with respect to only the Board's limited generic promotion and advertising program, not with respect to whether the creditable advertising assessments violated the First Amendment rights of the Respondents because (a) the Solicitor has waived that argument by appearing to only attack the Almond Board's "generic promotion program" and acknowledging that the creditable advertising assessments and regulations are no longer important because they have been changed (Solicitor's Brief at 13-16 and accompanying footnotes); and (b) the Ninth Circuit decision in *Cal-Almond I*, finding that the creditable advertising assessments and regulations promulgated thereunder unconstitutionally restricted truthful forms of advertising, without any showing of a compelling governmental interest, and not advancing that governmental interest, and not narrowly tailored (*Cal-Almond I* at SOL App. 65a-70a) does not conflict with any opinions of this Court, does not conflict with any other Court of Appeals decisions and does not involve an important question of federal law that has not been, but should be, settled by this Court.

This Court, in a consistent line of cases beginning with *Central Hudson Gas & Electric Corp. v. Public Service Commission of NY*, 447 U.S. 557 (1980) through the most recent decision on May 13, 1996, *44 Liquor Mart, Inc., et al. v. Rhode Island* (94-1140), 96 Daily Journal DAR 5459, has held that the government cannot restrict truthful, non-misleading advertising unless there is: (1) a substantial governmental interest; (2) the regulation substantially advances the governmental interest; and

(3) the regulations are narrowly tailored. This is the same test the Ninth Circuit applied in the instant case. (*Cal-Almond I*, SOL App. 62a-70a).

Since the Solicitor General has not properly preserved any challenge with respect to the creditable advertising assessments and the regulations imposed upon the handlers with respect to those creditable advertising assessments, any granting of certiorari in this case should be limited solely to the generic promotion program requiring all handlers to pay a certain amount of assessments to the Board for the Board's generic promotion and advertising — not for creditable advertising. Moreover, if the Court is inclined to grant certiorari, Respondents should be permitted to fully brief the issues and orally argue them as opposed to adopting the Solicitor's suggestion that the Court hold and dispose of this case in light of the disposition in *Wileman*.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION OVER THE PETITION FOR CERTIORARI AS IT WAS FILED OUT OF TIME.

In *Cal-Almond I* the Ninth Circuit decided (SOL App. 55a-70a) that the Almond Marketing Order's program and assessments relating to advertising and promotion violated Respondents' rights guaranteed under the Free Speech Clause of the First Amendment. The Ninth Circuit determined that assessments paid to the Almond Board for the Board's generic promotional program, and the assessments imposed against the handlers to either pay to the Board for the Board's generic promotional program, or to spend for "creditable advertising"

pursuant to the rules and restrictions contained in the Almond Marketing Order (7 C.F.R. §§ 981.4 & 981.441; SOL App. 492a-496a; the program being described by the Ninth Circuit at SOL App. 51a-58a) violated the Respondents' right guaranteed under the First Amendment of the United States Constitution. In all other respects the Ninth Circuit found the other provisions of the Almond Marketing Order challenged by the Respondents to be lawful. With respect to the remedy for the First Amendment violations, the Ninth Circuit determined that it was fact intensive and should be first addressed by the district court. The Ninth Circuit then remanded to the district court with respect to the remedy. (*Cal-Almond I*, SOL App. 93a-95a). The Ninth Circuit's decision in *Cal-Almond I* was filed on December 22, 1993. The government filed a petition for rehearing which was denied on April 5, 1994. (Resp. App. A). Thus the Ninth Circuit decision with respect to the First Amendment issue was final on April 5, 1994.

The matter proceeded back to the district court for a remedy, the district court determined that the Respondents were entitled to a refund of all advertising and promotion assessments for the crops years in question (1980-81 through 1991-92) that were either paid to the Board for the Board's generic promotion and advertising program, spent on advertising pursuant to the compulsion of § 981.41 and § 981.441 for advertising and promotion, or rebelliously escrowed (in the face of the government's suing the Respondents for not paying the assessments to the Board) in an attorney-client trust fund account or on deposit with the clerk of the court. (*See* SOL App. 44a-48a).

The government then filed an appeal with respect to the remedy decision of the district court, and on October 10, 1995 the Court of Appeals in *Cal-Almond II* affirmed in part and reversed in part. The Ninth Circuit held that all assessments paid by the

Respondents to the Almond Board for the Almond Board's generic promotion and advertising program, or were unused creditable advertising assessments paid by the Respondents to the Almond Board, and all monies escrowed or deposited with the clerk of the court reflective of the advertising and promotion assessments must be refunded to the Respondents. (*Cal-Almond II*, SOL App. 9a-17a).

With respect to creditable advertising assessments that Respondents paid "to third parties" (those would be third party advertisers), sovereign immunity would bar a refund of those assessments because they were never paid to the Board — even though Respondents spent them on behalf of USDA and the Almond Board. (*Cal-Almond II*, SOL App. 4a-9a).[2]

The Ninth Circuit's decision in *Cal-Almond II* did not at all modify its First Amendment decision in *Cal-Almond I*. The government never sought in *Cal-Almond II* to modify the Ninth Circuit's First Amendment decision in *Cal-Almond I*, and the only issues before the court in *Cal-Almond II* were the various issues of the remedy relating to the assessments. Respondents herein filed a petition for rehearing and suggestion for rehearing *en banc* with respect to the sovereign immunity issue and that was denied on February 20, 1996. (SOL App. 474a).[3]

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2. The Ninth Circuit had obvious difficultly in barring a refund of spent creditable advertising assessments under the doctrine of Sovereign Immunity: "Our analysis regarding sovereign immunity leads us to a somewhat awkward result: Although the handlers' compelled expenditures on creditable advertising violated their First Amendment rights, there is no individual remediation available for those violations. [citations omitted] * * * Under the Doctrine of Sovereign Immunity, we are compelled to conclude that the handlers' claims for reimbursement of the amounts they were wrongfully compelled to pay for creditable advertising is a right for which there is no individual remedy." (*Cal-Almond II*, SOL App. 8a-9a).

3. The government never sought rehearing before the Ninth Circuit with (Cont'd)

The Solicitor's petition for certiorari in this case was filed on May 20 1996 exactly 90 days after the Ninth Circuit denied Respondents' petition for rehearing in *Cal-Almond II* on February 20, 1996. However the petition filed in this case does not direct its attention to the remedy provided by the Ninth Circuit in *Cal-Almond II*, but only the Ninth Circuit First Amendment decision in *Cal-Almond I* which was finally decided more than two years before the petition was filed in this case. The question presented in the petition here relates solely to the First Amendment. (*See* "Question Presented").

Title 28 U.S.C. § 2101 states in pertinent part: "Any other appeal or any writ of certiorari intending to bring any judgment or decree in a civil action suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree." Rule 13.1 of the Rules of the Supreme Court likewise requires a petition for certiorari to be filed within 90 days after entry of the judgment. The Solicitor in this case is attempting to use the judgment in *Cal-Almond II* as the coattail for filing its petition in this case when it does not seek review of the *Cal-Almond II* judgment.

In *Federal Trade Commission v. Collegate-Palmolive Co.*, 380 U.S. 374 (1965) the Court held that if the Court of Appeals " ' . . . did no more by the second judgment than to restate what it had decided by the first one * * * the 90 days would start to run from the first judgment.' [citations.]" (ellipses in *Collegate-Palmolive*) *id.* at 380 U.S. 378-79.

(Cont'd)
respect to the remedies that the Ninth Circuit did provide. As stated previously the Respondents in this case timely filed a petition for certiorari before this Court on May 20, 1996, docketed June 10, 1996, Case No. 95-1978 seeking review of the Ninth Circuit's sovereign immunity issue. The rules regulations and restrictions regarding the Almond Marketing Order are discussed in more detail in said petition for certiorari.

The Solicitor has previously acknowledged in its petition for certiorari in *Wileman*, Case No. 95-1184, that it could have filed a petition for a writ of certiorari from the *Cal-Almond I* decision but chose not to do so "based in part on specific features of the regulations establishing the generic advertising program for almonds as to which the Secretary was considering significant amendments at the time of the Ninth Circuit's decision." (Solicitor's Petition in *Wileman* at 24 n. 16). However, the only consideration for changes was with respect to the creditable advertising regulations. (*See* Resp. App. C).

The *Wileman* case was similar in its procedures as *Cal-Almond*. The Agricultural Marketing Agreement Act requires that handlers aggrieved by a marketing order must file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). *Cal-Almond* and *Wileman* both proceeded through the exhaustion process before USDA and then proceeded to the district court upon the decision by the Judicial Officer pursuant to 7 U.S.C. § 608c(15)(B). *Cal-Almond I* reached the Ninth Circuit first and the Ninth Circuit rendered its decision on December 22, 1993 finding that the advertising and promotion program violated the First Amendment and remanded it back to the district court for purposes of determining the remedy. The *Wileman* case eventually reached the Ninth Circuit Court of Appeals and on June 27, 1995 the Ninth Circuit found that the generic promotion and advertising program for Treefruit violated the handlers' rights in contravention of the First Amendment and remanded it back to the district court "to fashion an appropriate remedy consistent with this opinion." (SOL App. in *Wileman* 34a-35a; 58 F.3d 1386).

However before the district court could reach the issue of a remedy in *Wileman* the Solicitor filed a petition for certiorari in that case with virtually the identical "question presented" as presented in the instant case, to wit: "Whether it violates the First

Amendment for the Secretary of Agriculture, pursuant to Marketing Orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* to require the handlers of California peaches, nectarines and plums to fund generic advertising programs for those commodities."

In its petition for certiorari, the Solicitor invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (p. 2 of Petition in *Wileman*), and in footnote 2 of same petition, it claims that because the *Wileman* Ninth Circuit orders were unclear as to when the case was "finally effective" "we have treated the date of the first order denying rehearing — September 18, 1995 — as the one that triggered the 90 day period for filing a petition for a writ of certiorari prescribed in 28 U.S.C. § 2101(c) and this Court's Rule 13.1, and on that basis we requested extensions of time within which to file a petition for a writ of certiorari." (p. 2 of *Wileman* petition, fn. 2).

Thus in *Wileman*, the Solicitor treated the 90 day rule of § 2101(c) to be from the date the petition for rehearing was denied in *Wileman relative to the First Amendment issue but in this case they are attempting to treat the remedial judgment in Cal-Almond II as the starting point for the 90 day period but seeking review of the Cal-Almond I decision.* Since the *Cal-Almond II* decision did not disturb the decision in *Cal-Almond I* nor did the government seek to disturb, in *Cal-Almond II*, the *Cal-Almond I* judgment the 90 day period began on April 5, 1994 when the Ninth Circuit in *Cal-Almond I* denied the government's petition for rehearing with respect to that First Amendment issue. Thus at the very least (*but see, Collegate-Palmolive, supra*) either the petition for certiorari in *Wileman* was premature (because the remedy had not been addressed) or the petition filed in the instant case is far too late. Based upon 28 U.S.C. § 2101(c) the petition for certiorari in this case is out of time and this Court lacks jurisdiction to entertain it.

II.

EVEN IF THE PETITION WAS TIMELY FILED, THE CREDITABLE ADVERTISING ASSESSMENTS AND THE REGULATIONS RELATING TO THE SAME ARE NOT ISSUES FAIRLY INCLUDED IN THE QUESTION PRESENTED FOR REVIEW.

The question presented by the Solicitor in this case is: "Whether it violates the First Amendment for the Secretary of Agriculture pursuant to a marketing order issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.* to require the handlers of California almonds to fund a generic advertising program for that commodity." The question is virtually identical to the question presented in the Solicitor's *Wileman Bros.* petition for certiorari. The Treefruit Marketing Order at issue in *Wileman* did not at all involve creditable advertising assessments nor restrictions and regulations regarding permissible (or restricted) expenditures for creditable advertising presented under the Almond Marketing Order. The Solicitor acknowledges herein that the features of each program are relevantly different. (Petition at 15-16 and accompanying footnotes).

Despite the clarity of the question presented in the instant case *i.e.* it relates solely to assessments handlers are required to pay to the Board for the *Board to carry out generic promotion and advertising* (similar to that in *Wileman*) the Solicitor, at times in its petition, seems to indicate that it is challenging *both* the generic program and the creditable advertising feature of the Ninth Circuit's decision in *Cal-Almond I* but then appears to go full circle and seems to challenge only the generic aspect of the program and not the creditable advertising regulations and assessments.[4]

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4. For example at page 11 of the petition the Solicitor states: "Because (Cont'd)

Rule 14.1(a) of the Rules of the Supreme Court states that the question presented must be "expressed concisely in relation to the circumstances of the case without unnecessary detail" and that "the statement of any question presented is deemed to comprise every subsidiary question fairly included therein," and that "only the question set out in the petition or fairly included therein will be considered by the court." Respondents contend that based upon the question presented in this case, which is the identical question presented in *Wileman*, and because the Solicitor stated in *Wileman* (Petition at 24 fn. 16) why they did not seek certiorari in *Cal-Almond*, the only issue "fairly included in the question presented relates solely to the Almond Board activities of using assessments for generic promotion and advertising *but does not include any challenge to the Ninth Circuit's decision finding unconstitutional the regulations and restrictions of 7 C.F.R. § 981.41 and § 981.441* regulating and restricting creditable advertising, nor the creditable advertising assessments."

This Court noted in *Yee v. City of Escondido*, __ U.S. __, 112 S. Ct. 1522, 1532-1534 (1992) that the question presented therein was really a question as to whether or not the court below erred in finding "no physical taking" and therefore the question of whether or not the rent control ordinance effected a "regulatory taking" was not "fairly included therein." *Id.* at 1533.

(Cont'd)
the Ninth Circuit had based its decision in part on the restrictions to which the Secretary was considering revisions the Secretary did not at that time petition this court for a writ of certiorari to review the Ninth Circuit's judgment on the First Amendment issue." At pages 13-14 of said petition the Solicitor again remarks how different the two programs are with respect to the creditable advertising assessments, but that because the court in *Wileman Bros.* did not restrict its reading of the First Amendment of the *Cal-Almond* decision to be solely a complaint with respect to the creditable advertising assessments but also applied it to the generic promotion program the court should grant certiorari in this case for the same reasons it warranted review in *Wileman*.

Thus in this case the Ninth Circuit's decision in *Cal-Almond I* finding unconstitutional the creditable advertising assessments and the creditable advertising rules and regulations as violating the handlers' First Amendment rights is not fairly included within the question presented herein of whether or not the Almond Board's generic program (funded by *other* assessments) violates the handlers' First Amendment rights.

III.

IF THE CREDITABLE ADVERTISING ASSESSMENTS AND REGULATIONS ISSUES DECIDED BY THE NINTH CIRCUIT IN *CAL-ALMOND I* ARE FAIRLY INCLUDED WITHIN THE QUESTION PRESENTED THE ISSUES FAIL TO SATISFY ANY OF THE CERTIORARI CRITERIA APPEARING IN SUPREME COURT RULE 10.1.

The Ninth Circuit decision on *Cal-Almond I*, with respect to the creditable advertising regulations and assessments, applied the *Central Hudson* four-part test (SOL App. 58a-70a).

Quite clearly the creditable advertising regulations and restrictions found in 7 C.F.R. § 981.41 and § 981.441 are not at all concerned with "truthfulness" or "deceptiveness" but specifically restrict truthful forms of advertising and promotion for which credits for assessments will not be allowed.

The Ninth Circuit found (SOL App. 65a-70a) that those restrictions hindered handlers' advertising and promotion programs, that the restrictions made no sense and were designed to favor Blue Diamond the largest competitor in the industry.

Since at least 1980 when this Court decided *Central Hudson* the law has been clear that commercial speech cases are subject to a four-part analysis. (*Central Hudson*, 447 U.S. 566) This

four-part test has been applied in every one of this Court's commercial speech cases for the last decade[5] until May 13, 1996 when this Court in *44 Liquor Mart Inc., et al. v. Rhode Island supra* basically eviscerated the distinction between commercial speech and "fully protected" speech and basically held that if the advertisements propose a legal proposition and are not deceptive the government, because of the First Amendment, is without power to regulate. While there were various concurring opinions the bottom line is that, even if the four-part test of *Hudson* applied, the State of Rhode Island could not prohibit truthful advertising of alcohol prices. Thus, in the present case, if the less protected commercial speech (*vis a vis* political speech) test is applied the creditable advertising regulations and assessments imposed for the same[6] would be summarily struck down pursuant

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5. *See Rubin v. Coors Brewing Co.*, __ U.S. __, 115 S. Ct. 1585 (1995); *Florida Bar v. Went-For-It, Inc.*, __ U.S. __, 115 S. Ct. 2371 (1995); *Ibanez v. Florida Dept. Of Business & Professional Regulations, etc.*, __ U.S. __, 114 S. Ct. 2084 (1994); *Edenfield v. Fane*, __ U.S. __, 113 S. Ct. 1792 (1993); *United States v. Edge Broadcasting Co.*, 509 U.S. __, 113 S. Ct. 2696 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. __, 113 S. Ct. 1505 (1993); *Board of Trustees of the State University of NY v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028 (1989); *Posadas de Porto Rico Associates v. Tourism Co. Of Porto Rico*, 478 U.S. 328, 106 S. Ct. 2968 (1986).

6. This Court has long held that compelled contribution for others' speech is protected under the free speech clause as equally as restrictions on speech (*Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977); *Lehnert v. Ferris Faculty Assoc.*, __ U.S. __, 111 S. Ct. 1950 (1991)) and financial burdens imposed on speakers is also equally protected against (*Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, __ U.S. __, 112 S. Ct. 467, 508 (1991); *Forsyth County, Georgia v. The Nationalist Movement*, __ U.S. __, 112 S. Ct. 2395, 2404 (1992)); *United States v. National Treasury Employees Union*, __ U.S. __ 115 S. Ct. 1003, 1014 (1995) (A federal statute prohibiting the receipt of honoraria by government employees for giving speeches or writing violated their First Amendment (Cont'd)

to this Court's previous decisions cited *supra*.[7]

IV.

IF CERTIORARI IS GRANTED IT SHOULD NOT BE "HELD AND DISPOSED OF AS APPROPRIATE IN LIGHT OF THE DISPOSITION OF THE PETITION [IN *WILEMAN*]".

Throughout the Solicitor's petition it is claimed that the almond advertising program is different than the Treefruit program and that "we believe that *Wileman Bros.* provides a more appropriate vehicle for review of the First Amendment issue than does this case." (Petition at 13). The Solicitor then proposes that "the petition for writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition for a writ of certiorari in [*Wileman*]." (pp. 13-17) Respondents vehemently object to this case and these Respondents being treated as the forgotten stepchildren. The Respondents in this case had their First Amendment issue decided over one and half years before the Ninth Circuit reached

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(Cont'd)
rights despite the fact that the employees were not "prohibited" from speaking; " . . . its prohibition on compensation unquestionably imposes a significant burden on expressive activity. [citation omitted.]" *id.* at 1014).

7. With respect to the Almond Board's "generic" advertising and promotion program financed by assessments other than creditable advertising assessments, Respondents do *not* argue herein that that issue does not satisfy the certiorari criteria appearing Supreme Court Rule 10.1 as it would be foolish to do so in light of the fact that this Court has previously granted certiorari in *Wileman* with respect to an identical question. But in that regard Respondents still contend that certiorari cannot be granted because the petition was untimely filed.

the decision in *Wileman*. As the Solicitor acknowledges, the Ninth Circuit in *Wileman* relied extensively on the decision in *Cal-Almond I* (Petition at 12). The Respondents have advanced this case much further than the Respondents have in *Wileman* given the fact that Respondents in this case proceeded through the remedy phase and received a decision in *Cal-Almond II*. The Respondents have filed a petition for certiorari in *Cal-Almond II* (with respect to the issue of sovereign immunity). The Respondents have filed an amicus brief in the *Wileman* case and the impact of this Court's decision in *Wileman* would obviously have an impact (the extent of which of course unknown and unknowable at this time) with respect to not only the constitutionality of the "old" almond program, but the current ongoing Almond Marketing Order promotion and advertising program and Respondents' obligations under that program. (*See* Resp. App. B).

The Solicitor alleges (Petition at 11) that the new revisions to the creditable advertising regulations "eliminate many of the former restrictions of the types of advertising for which an individual handler may receive credit against its assessments (*citing* 59 Fed. Reg. 35,226-35,227). However these regulations were immediately challenged by these Respondents and additional almond handlers, and administrative proceeding have taken place pursuant to 7 U.S.C. § 608c(15)(A). On June 15, 1996 the Administrative Law Judge issued a ruling finding that the new regulations for credit still violate the First Amendment and that the Secretary once again failed to show that either the generic promotion program or the creditable advertising program substantially advances any substantial governmental interest, and that the restrictions were not narrowly tailored. (*See* Resp. App. B).[8] The new rules still prevent credit for various

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8. The ALJ decision was appealed by USDA to its Judicial Officer who has stated it desires to withhold ruling on it until this Court decides *Wileman*.

types of truthful honest promotion and advertising and now only permit a two-thirds credit (and a lesser amount depending upon the percentage of almonds in a particular ingredient product) as opposed to what previously allowed a 100% credit. (*See* Resp. App. C; 7 C.F.R. § 981.441(a) and (e)(1)-(e)(4) and (e)(4)(iii) and (iv)).

The Almond Board and USDA still occupy the position under the new regulation as judge and jury as to whether or not the advertisement and promotion conducted by handlers receive credit (7 C.F.R. § 981.441(a)) and they still review the handlers' advertising and promotion efforts and allow a board of competitors to sit in review as to whether or not the advertisements can receive credit. (7 C.F.R. § 981.441(f)). Thus the Solicitor's statement (Petition at 11) that "many of the former restrictions on the types of advertising for which an individual handler may receive credit against its assessment" have been eliminated, is not true.

Based upon the procedural position of the Respondents in this case, the Respondents in *Wileman,* the fact that the Respondents herein have filed a petition for writ of certiorari with respect to the sovereign immunity remedy issue, and that current ongoing challenges to the "new" almond regulations are occurring, the Respondents herein should have far more input into the Court's decision in *Wileman* than suggested by the Solicitor. Moreover if this Court believes that the Solicitor timely filed its petition it should be either denied (with the Court's decision in *Wileman* providing the authority for the generic programs (described in the Solicitor's petition in *Wileman*) in existence — other than almonds — or if certiorari is granted the Respondents should be allowed to fully brief the issue and orally argue it before the court.

The Solicitor apparently believes that it has "better facts" in

Wileman. Respondents do not disagree (even though the facts and programs involving *Wileman* should be struck down as violative of the First Amendment) but Respondents allege that if the Court is inclined to grant the petition or dispose of it as "appropriate in light of the disposition in [*Wileman*]", the Respondents should have a meaningful opportunity to fully brief the issues and participate in oral argument.

CONCLUSION

The petition for writ of certiorari should be denied as it was filed out of time. If the Court is inclined to grant the petition for a writ of certiorari it should not be held and disposed of in light of the disposition in *Wileman* but should be granted with full participation in briefs and oral arguments by the Respondents. Finally the question presented in this case does not fairly include the creditable advertising assessments or regulations imposed for the same and therefore that should not be an issue in this matter.

Respectfully submitted,

BRIAN C. LEIGHTON
Counsel of Record
701 Pollasky Avenue
Clovis, California 93612
(209) 297-6190

JAMES A. MOODY
2300 "N" Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9011

Attorneys for Respondents

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 5, 1994

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16031
D.C. No. CV-91-00123-REC

CAL-ALMOND, INC., a California corporation; GOURMET PACKING CO., INC., a California corporation; GOLD HILLS NUT CO., INC., a California corporation

Plaintiffs-Appellants

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant-Appellee

No. 92-16527
D.C. No. CV-91-00685-REC

CAL-ALMOND, INC., a California corporation; GOLD HILLS NUT CO., INC., a California corporation

Plaintiffs-Appellants

vs.

UNITED STATES OF AMERICA

Defendant-Appellee

Appendix A

No. 92-16033
D.C. Nos. CV-91-00122-REC

CAL-ALMOND, INC., a California corporation

Plaintiff-Appellant

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant-Appellee

No. 92-16034
D.C. No. 91-00064-REC

CAL-ALMOND, INC., a California corporation; SAULSBURY ORCHARD AND ALMOND PROCESSING, INC.; CARLSON FARMS, a sole proprietorship

Plaintiffs-Appellants

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant-Appellee

ORDER

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

Appellee's petition for rehearing is DENIED.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED JUNE 15, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

94 AMA Docket No. F&V 981-1

In re:

Cal-Almond, Inc., Gold Hills Nut Company, Inc., and Frazier Nut Farms, Inc.,

Petitioners

AND

94 AMA Docket No. F&V 981-3

In re:

Del Rio Nut Company and Monte Vista Farming Company,

Petitioners

AND

94 AMA Docket No. F&V 981-4

In re:

Bal Nut, Inc., Carlson Farms, Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, and Rotteveel Orchards,

Petitioners

Appendix B

AND

94 AMA Docket No. F&V 981-5

In re:

Treehouse Farms, Inc.,

Petitioners

AND

94 AMA Docket No. F&V 981-7

Theron Shamgochian, Inc. dba Monte Cristo Packing Company, formerly known as Monte Cristo Packing Company and Theron Shamgochian Ranches, Inc. dba Monte Cristo Packing Company but known always to the Almond Board for the subject crop years as Monte Cristo Packing Company; Beard's Quality Nut Company, a sole proprietorship; and Amaretto Orchards, a California general partnership

Decision and Order

The Purpose and Nature of This Proceeding

Cal-Almond, Inc. v. United States Department of Agriculture, 14 F.3d 429 (9th Cir. 1993), ("*Cal-Almond I*") held that the California Almond Marketing Order's Promotion Program violated the First Amendment rights of almond handlers. The parties agree that the decision in *Cal-Almond I* is conclusive as to assessments charged Cal-Almond and the other petitioners who were parties in that case for marketing years 1980-81 through 1991-92. Cal-Almond, Gold Hills and Frazier seek to similarly have the assessments declared unlawful which

were charged them for advertising and other forms of promotional activity for subsequent marketing years. The petitioners who were not parties in the *Cal-Almond I* case seek recovery of all the assessments they paid under the Almond Order for advertising and promotion for every marketing year since 1986-87.[1]

During a prehearing teleconference conducted on November 8, 1994, I denied a motion to apply the doctrine of non-party offensive collateral estoppel against respondent, USDA, to preclude its presentation of evidence. This ruling was based on *United States v. Mendoza*, 464 U.S. 154, 158 (1984), which held that "nonmutal offensive collateral estoppel is not to be extended to the United States."

During that teleconference, I also denied respondent's motion to apply the doctrine of laches against those petitioners who awaited the Ninth Circuit's decision before asserting their claims in respect to the 1986-87 through 1992-93 marketing years. This ruling was based on the fact that an administrative law judge does not have the inherent powers of courts of law and equity and in the absence of statutory or regulatory authority may not bar claims for undue delay in their filing. *See In re Sequoia Orange Co., Inc.*, 51 Agric. Dec. 123, 127-129 (1992).[2]

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1. Theron Shamgochian and the other petitioners in 91 AMA Docket No. F&V 981-7, requested refunds back to the 1980-81 marketing year, but proposed conclusions filed by their attorney start their claim with the 1986-87 crop year.

2. This does not necessarily mean that a reviewing court will not exercise its inherent powers and bar those petitioners who delayed seeking refunds of assessments to await the *Cal-Almond I* decision. *See Gruca v. United States Steel Corp.*, 495 F.2d 1252, 1259 (3d Cir. 1974), which held delay for that reason to be inexcusable.

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Oral hearings were conducted on November 14, 1994 through November 17, 1994, in Fresno, California and on December 13, 1994 through December 16, 1994, in Los Angeles, California. An evidentiary record was developed consisting of 2,560 pages of transcript and approximately 300 exhibits. Forty-three witnesses testified.

The purpose of the hearing requires explanation. My functions would normally be wholly defined by 7 U.S.C. § 608 c (15)(A) which operates under pertinent case law to require a handler challenging an obligation under a marketing order to first seek a ruling from the Secretary that it is not in accordance with law. Only after exhausting this administrative remedy may a handler take the challenge to court. *See Saulsbury Orchards and Almond Processing, Inc. v. Yeutter,* 917 F.2d 1190, 1197 (9th Cir. 1990). This is true even when, as here, a question of constitutional law is at issue. *See United States v. Ruzicka*, 329 U.S. 287, 294 (1946).

On the other hand, the circuit which will eventually review this case has already addressed the constitutional issue that is the sole subject of the petitions. Although respondent was allowed to present new evidence in this proceeding, the legal conclusions of the Ninth Circuit on this issue are controlling. The Department of Agriculture does not pursue a policy of nonacquiescence in cases subject to review in a circuit which has already addressed a controlling legal issue. *In re Sparkman*, 50 Agric. Dec. 602, 609 (1991); *In re Stamper*, 41 Agric. Dec. 1935, 1949 (1982).

In arriving at its decision that handlers' First Amendment rights of free speech had been violated, the Ninth Circuit reviewed the operation of the California Almond Marketing Order and reached a number of legal conclusions which must be

considered binding in that circuit and thereby binding in this proceeding.

Firstly, it decided that:

> . . . while the Order, clearly does not compel appellants to advertise; it does compel them to expend a certain sum of money every year on either assessments (for generic almond promotion) or creditable advertising. Since either alternative burdens appellants' First Amendment rights, these rights are clearly implicated by a program containing both.

14 F.3d at 434. This holding is consistent with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119, 1132-33 (3d Cir. 1989), even though *Frame* eventually went on to uphold the constitutionality of the Beef Promotion Act. As in *Frame*, the *Cal-Almond I* court next applied the test specified in *Central Hudson Gas and Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980), for evaluating the constitutionality of commercial speech regulation.

This test and the Department's evidentiary burden under it, were summarized in *Cal-Almond I*:

> . . . for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be 'substantial,' (b) the program must 'directly advance' that interest, and (c) the program must not be more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566,

> 100 S. Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, __ U.S. __, __, 113 S. Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

14 F.3d at 437. USDA was held to have satisfied its first burden of proving a substantial government interest in promoting the consumption of almonds: "We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest." 14 F.3d at 437.

However, USDA was held to have failed to have met its burden of showing: (1) that the almond advertising and promotion program "directly advance" the government's stated goals of selling more almonds and increasing returns to producers, and (2) that the implementing regulations were not more extensive than necessary. 14 F.3d at 437-440. In so doing, the Court pointed to the dearth of evidentiary proof by USDA that the program met both of these preconditions for government regulation of commercial speech.

Additionally, *Cal-Almond I* held that the program infringes on the First Amendment rights of handlers to free association which is subject to evaluation under an even more stringent standard than the *Central Hudson* test. Because the court held the Almond Order's Promotion Program was unconstitutional under the less stringent *Central Hudson* standard, it found no need to apply the more stringent freedom of association test set forth in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). *See Cal-Almond I*, 14 F.3d at 436. But as petitioners point out, the

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Almond Order's Promotion Program must also pass constitutional muster under the applicable freedom of association standard.

My principal role, therefore, is to act as a fact finder and evaluate the evidence presented by USDA in the present proceedings in satisfaction of these First-Amendment standards as the Ninth Circuit has applied them to the California Almond Marketing Order.

In addition to the petitioners and the Department of Agriculture, Blue Diamond Growers, Inc. (a grower owned cooperative that markets almonds for its members) and Paramount Farms, Inc. (a handler affiliated with a grower with a similar name whose crop it markets) have been allowed to file briefs. Briefing was completed on May 9, 1995.

The Almond Promotion Program

The Almond Order's Promotion Program differs from the Beef Promotion and Research Order that was upheld as constitutional in *Frame*.

The Beef Promotion and Research Order exclusively employs mandatory assessments collected by handlers from growers to fund generic advertising and promotion. This is true of virtually every farmer/grower "self-help" program Congress has enacted to assist in the sale of agricultural commodities and enhance grower returns. This form of governmental intervention is practiced to overcome the "free rider" problem that hinders effective generic advertising when financed on a voluntary basis. Frame found this intervention justified by a national interest in "preventing further decay of an already deteriorating

beef industry . . . . (because a) continuation of this trend would endanger not only the country's meat supply but the entire economy." *Frame*, 885 F.2d at 1134.

Against this background the *Frame* court held:

> In conclusion, although we find that the Beef Promotion Act implicates the first amendment rights of those obligated to participate, we hold that the government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the act in a way that infringes on the contributors' rights no more than necessary to achieve the stated goal.

885 F.2d at 1137. The Almond Order's Promotion Program also seeks to promote the sale of an agricultural commodity. But that is its only real similarity to the Beef Promotion Order.

The almond industry is thriving. Per capita consumption of almonds in America has grown 38% since 1986-87. Acreages allocated to almond production have increased annually. The size of the industry in terms of the numbers of growers and handlers, has likewise increased. This has been mainly fueled by increases in export sales and sales of almonds to domestic manufacturers for ingredients in candy, cereal and other products.

The major almond handler, Blue Diamond, which supplies approximately 90% of the retail market, has regularly engaged in branded advertising of its almonds and spent many times more

on advertising than any of its competitors or the Almond Board. Blue Diamond would have advertised its almonds even in the absence of the Almond Order's Promotion Program.

Generic advertising and promotion of almonds has not been, until recently at least, the major purpose of the program. The generic advertising and promotion which the Almond Board conducted through the 1992-93 market year was insubstantial and ineffective. Ostensibly, every handler was charged a creditable advertising assessment each marketing year of usually 2 1/2 cents per kernel pound of almonds handled. The handlers, however, were encouraged to conduct branded advertising and promotions for which they received credit in avoidance of the assessments. Those who did pay rather than advertise, saw part of their payments used to reduce everyone's administrative assessments for the Board's general operating expenses.

After the 1992-93 marketing year, "creditable advertising assessments" were replaced by a "credit-back" program which does generate larger sums for generic advertising and promotion. An effective generic promotion program is now conceivable, but still unimplemented. Even so, the stimulation of branded advertising and promotion continues to be an essential function of the Almond Order's Promotion Program.

The asserted governmental goal is to enhance grower returns through increased sales and higher farm prices. The essential purpose of branded advertising, however, is to increase the advertiser's share of the market. Some branded advertising programs, such as Blue Diamond's "Can-A-Week" campaign, may also increase the overall demand for the product advertised. But their real purpose is to convince prospective buyers to buy

the brand advertised. When buyers are responsive, the advertiser receives the desired benefit of greater profits, which are not, except in a most problematic sense, shared with competitors or non-aligned growers. Thus, the government interest of selling more almonds and enhancing producer returns would seem only incidentally rather than "directly" advanced by a program that actively encourages the use of branded advertising.

This function of the Almond Order's Promotion Program would appear by itself to preclude the program from meeting the Supreme Court's test for permissible government regulation of commercial speech. However, in concluding that the Promotion Program did not, directly advance the government interest asserted, the *Cal-Almond I* court stated instead:

> In sum, the record indicates that the regulations do not stimulate additional or more effective advertising from Blue Diamond. Appellants have presented evidence showing that the regulations hinder their own marketing efforts, and USDA has presented no evidence that the regulations assist the efforts of other handlers. Therefore, we hold that the regulations do not "directly advance" the government's asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellant's First Amendment rights."

14 F.3d at 439. *Cal-Almond I* went on to further conclude that the creditable advertising regulations were also "more extensive than necessary" and, for that reason, contrary to the final requirement of the *Central Hudson* test which was explained as

a "reasonable fit" test in *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 480 (1989):

> It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. This court has interpreted *Fox* as holding that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991). The creditable advertising regulations disregard such means, and therefore are more extensive than necessary to serve the interest of increasing almond sales.

14 F.3d at 440.

The "Directly Advance" Test and the Present Record

Respondent's brief first argues that the Ninth Circuit applied the "directly advance" test more restrictively than intended by the Supreme Court and failed to accord sufficient deference to legislative judgment.

However, the Supreme Court recently addressed this test in *Rubin v. Coors Brewing Co.*, 63 U.S.L.W. 4319 (U.S. Apr. 19,

1995), and specifically rejected the argument advanced by respondent that under *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), greater deference should be shown legislative judgment in regulating commercial speech: "Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis." 63 U.S.L.W. at 4321 n.2.

The Supreme Court explained anew the application of the "directly advances" part of its test for determining whether a regulation of commercial speech survives First Amendment scrutiny:

> The remaining *Central Hudson* factors require that a valid restriction on commercial speech directly advance the government interest and be no more extensive than necessary to serve that interest. We have said that '[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislative's ends and the means chosen to accomplish those ends' *Posadas, supra,* at 341. . . .
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> Just two terms ago, in *Edenfield v. Fane*, 507 U.S. __ (1993), we had occasion to explain the *Central Hudson* factor concerning whether the regulation of commercial speech 'directly advances the governmental interest asserted.' In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the

> Government's interest 'in a direct and material way.' *Id.*, at __ (slip op., at 5). That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' *Id.*, at __ (slip op., at 9).

63 U.S.L.W. at 4322. Therefore, respondent errs in arguing that *Cal-Almond I* applied the Supreme Court standard too rigidly.

Respondent next asserts that in applying the "directly advance" test, the Ninth Circuit incorrectly concentrated on the effects the Almond Promotion Program has on handlers, and ignored its benefits to growers.

If there is any confusion as to whom the Almond Order's Promotion Program is designed to assist, the confusion is caused by the program itself. Unlike the majority of other promotion programs that charge assessments to growers which handlers are merely required to collect, the Almond Order charges the assessments to the handlers. Handlers are then free to negotiate deductions for the assessments from the prices they pay growers. Some do; some do not. But irrespective of whether the grower, handler or consumer is the one who ultimately pays the assessments, the Almond Board has only collected them from those handlers who did not engage in branded advertising or other forms of approved brand related promotion. Comparison of the small amount of money actually collected and used by the Board for generic advertising and promotion out of the relatively huge amounts assessed for it, makes it abundantly clear that the

essential purpose of the program was not to engage in generic advertising and promotion, but rather to induce expenditures by all handlers equivalent, on a per kernel pound basis, to those expended by Blue Diamond for its brand advertising.[3]

The testimony by Blue Diamond's representative, Algernon Greenlee, shows that Blue Diamond's concern is that if it alone engaged in advertising and promotion, its competitors could use their lower costs to price their products below Blue Diamond and enjoy a competitive advantage. This point is reiterated at page 20 of Blue Diamond's brief. In fact, Blue Diamond regulates its spending for advertising to assure that it spends no more than the credit it receives against the advertising assessment, and thereby spends no more per pound than the amount its competitors are compelled to spend under the Order. As was found in *Cal-Almond I*, the Almond Order's Promotion Program has not stimulated additional or more effective advertising from Blue Diamond. What it has done is to require Blue Diamond's competitors to make equivalent expenditures. These competitors include the petitioners who have again testified as was done in *Cal-Almond I*, that they could more effectively market their product through methods other than those authorized as "creditable" methods for avoiding payment of the advertising assessments. Moreover, the type and level of the Board's generic advertising and promotion did not target the markets where petitioners sell their products and was of scant assistance to them.

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3. During the 1987-88 through the 1990-91 marketing years, the total expenditure by the Almond Board for advertising, promotion and public relations ranged between $840,000 to $1,400,000 per year, whereas during the same time period, Blue Diamond spent $8,000,000 to $14,200,000 per year on advertising.

Respondent has urged, however, that competing handlers benefitted whenever Blue Diamond's advertising increased its sales of almonds because that reduced the amount of almonds it had available to sell in other outlets. Therefore, respondent continues, Blue Diamond had less almonds to sell overseas and its competitors could increase their prices in accordance with the economic law of "one price" in the export market where almond demand has been inelastic. This kind of benefit is simply too remote to meet the *Central Hudson* standard. But not only did the Promotion Program fail to materially aid any of the petitioning handlers as it did Blue Diamond, it did not "directly advance" the interests of growers.

Even though Blue Diamond's "Can-A-Week" campaign may have incidentally increased consumer awareness of almonds, the same cannot be said of the "creditable" advertising and promotion by its competitors which the Promotion Program induced.

Those who could find no valid business reason for engaging in branded advertising were given credit for buying 1/2 ounce "charity packs" of almonds from the Almond Board for distribution to schools and churches. (Ex. AO1, par. 2; Tr. 406, Tr. 593, Tr. 605) Some owning little country stores received credit for advertising the stores. (Ex. HNF6, par. 2) Credit was given for billboards located in California. (Tr. 288-289) Credit was given to an almond handler for an automobile racing promotion. (Tr. 41) Credit was given for advertising in a program by "The Beautiful Ladies of Oil Wrestling" who wrestled while coated with almond oil. (Tr. 146-147) Handlers received credit for newspaper and radio brand advertisements which were of poor quality and limited success in selling almonds. (Tr. 272)

It stretches credulity to the breaking point to believe that

these forms of advertising and promotion expanded the overall market for almonds or otherwise enhanced the prices growers received for their almonds.

The only branded advertising that respondent can argue was of benefit to growers was Blue Diamond's. But Blue Diamond would have advertised even without the Almond Order. It controlled 90% of the retail market and its "Can-A-Week" campaign was directed to that market. If American consumers purchased more almonds at retail stores as a result of the campaign, Blue Diamond was the obvious, prime beneficiary. When the Almond Board contracted with Dr. Jason Christian of the Department of Agricultural Economics at the University of California-Davis, to research the impact of advertising on almond demand, the only data on advertising expenditures given him was Blue Diamond's.

Dr. Christian's study found a direct correlation between the total volume of almonds sold and the amount Blue Diamond spent each year to advertise. He concluded that the more Blue Diamond advertised, the more demand increased. The problem with this conclusion is akin to Sherlock Holmes' statement about a stick found lying on the ground being used as evidence. Looked at from one end it points in one direction; walk around it and it points in the opposite direction. Inasmuch as Blue Diamond correlated its advertising budget to the amount of its annual advertising assessment which is computed on a per pound handled basis, the amount Blue Diamond spent on advertising was obviously greater in the years when the higher volumes were sold. In other words, it may well be that higher sales volumes caused higher advertising expenditures, and not the other way around.[4]

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4. This point was made by Professor Michael K. Wohlgenant, (Cont'd)

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Moreover, Blue Diamond's "Can-A-Week" campaign was conducted wholly within the United States and was directed to the retail market. But the increases in sales of almonds in the past ten years have been principally due to increased exports and increased purchases by domestic manufacturers for ingredient use. In fact, the share of almonds going to the domestic retail market has declined. As Professor Scott Davis of the Graduate School of Management, University of California-Davis, explained (J. Pet. #1, page 8):

> Based on the advertising and promotional material I have observed, it seems unlikely that advertising of any sort stimulates the demand by ingredients buyers. The advertising that was conducted during the time period studied by Christian seems primarily targeted toward household consumption of almonds as a snack (e.g. the "Can a Week" campaign) or as ingredients in recipes. Thus if advertising has been the primary force in stimulating the demand for almonds one would expect substantial growth in the demand by the household segment and limited growth by the ingredients segment. As a result, if the advertising is effective, we would expect an increase in the share of the market which is

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(Cont'd)

Department of Agricultural and Resource Economics at North Carolina State University, in his prepared direct testimony which critiqued Dr. Christian's study. (J. Pet. #2, page 7, par. 6) Although Dr. Christian and his colleague, Professor Sexton, returned to the stand to refute Professor Wohlgenant's critical comments, neither addressed this observation.

> attributable to household consumption relative to the share attributable to demand by ingredients buyers . . . . It appears that the demand by the ingredients buyers has increased more rapidly than the demand for direct household use.

But again, even if Blue Diamond's advertising was effective in selling almonds and enhancing grower returns, the assessments charged handlers did not make that happen. Blue Diamond would have advertised its brand anyway. The branded advertising and promotion by other handlers was virtually useless. Those dollars which did end up being spent on generic advertising and promotion were too few and too poorly spent to be effective. Several witnesses called by USDA testified that, in 1991, the Board's promotional activities had not been successful in promoting almonds. (Greenlee, Tr. at 356-57; Campos, Tr. at 611; Phinney, Tr. at 2240) A study commissioned by the Almond Board showed that when consumers were asked to identify the spokesperson for almonds, only 3% correctly identified Greg LeMond and 5% mistakenly identified Sandi Duncan. (Rx 154 attachment B page 14). Ms. Gullickson, the Board's new public relations person, testified that her firm's research showed that, in 1993, people had a "nambi-pambi kind of reaction" to almonds. (Tr. at 1211) Even respondent admits, at page 50 of its brief, that prior to 1992, ". . . one cannot expect to discover a very powerful generic campaign for that time period, or very measurable effects from that generic promotion."

Under the new credit-back provisions there should now be sufficient money to fund a generic program at an effective level. To that end, the Board has prepared a tentative advertising campaign featuring monks who cannot control their appetite for almonds. Whether this contemplated campaign will enhance the

image of almonds and benefit the industry, is untested and uncertain. Respondent admits at page 63 of its brief that it "cannot be expected to produce a measurable attributable increase in almond sales at such an early stage. . . . (but it) might be expected to ultimately increase the price and/or sales of almonds." Although Ms. Gullickson's firm has been trying to improve consumer reaction to almonds, she had no evidence that her efforts have been successful. (Tr. at 1248, 1284) None of the Board's other advertising or public relations people presented any evidence that any of the Board's recent efforts have been successful in stimulating the demand for almonds. (Lundeen, Tr. at 1349, Buxton, Tr. at 1620, 1654-55)

A similar lack of evidence of the effectiveness of proposed generic advertising recently caused the United States District Court for the Eastern District of California to grant a preliminary injunction when it applied *Cal-Almond I* to the California State program for advertising apples. *See Bidart Bros. v. California Apple Comm'n*, No. CV-F-94-6018-OWW, Slip op. at 14 (D.C. Cal. Dec. 1, 1994).

In sum, under *Cal-Almond I*, USDA was required to produce evidence showing that the Almond Order's Promotion Program "directly advances" the asserted government interest, and this record lacks that evidence.

The "No More Extensive Than Necessary" Test and the Present Record

The final test under *Central Hudson* which the Almond Order's Promotion Program must meet, is the "no more extensive than necessary" test.

This test was explained in *Rubin*, 63 U.S.L.W. at 4323, as

requiring government regulation of speech to be "sufficiently tailored to its goal" else there is not a sufficient "fit". The availability of options, "all of which could advance the Government's asserted interest in a manner less intrusive to . . . (a regulated person's) First Amendment rights, indicates that the . . . (government action) is more extensive than necessary". *See Rubin*, 63 U.S.L.W. at 4323-4324.

Cal-Almond I decided that the creditable advertising regulations for determining which forms of advertising and promotion were eligible for credit were too restrictive and failed the "no more extensive than necessary" test. Specifically, *Cal-Almond I*, 14 F.3d at 440, found no logical justification for the restrictions which denied credit for ads promoting more then two complementary branded products; ads promoting a product that also has competing nuts; or ads promoting retail stores not owned by handlers.

The present record also fails to justify such restrictions which were in force under the creditable advertising program from 1986 through 1992.

Under the new credit-back program, such restrictions have been removed. But petitioners contend they are improperly being denied credit for personal selling and their travel expenses to develop new overseas markets.[5]

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5. Some petitioners also urged they should be given credit for their investments in plant equipment and for lavish client entertainment. Inasmuch as investment in plant equipment is a capital outlay incurred for many reasons other then increasing overall demand for almonds, it should neither be credited nor should the Promotion Plan be faulted for its denial. Client entertainment which in the almond industry appears to be extremely lavish, is so completely identified with the firm that provides the entertainment that competitors should not be made to participate in its cost via "credits."

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The credible evidence of record convinces me that the petitioners do not need the Promotion Program to cause them to engage in either activity. Just as Blue Diamond would advertise its almonds in the absence of the Promotion Plan, so would petitioners personally sell and travel to sell their almonds. However, inasmuch as this regulatory system allows handlers credit for branded advertising and promotion because overall sales and grower returns may be increased, it is arbitrary to deny credit to handlers for personal selling which is just as likely to accomplish that result. It is also arbitrary to deny handlers credit for their overseas travel to develop new markets when this kind of travel by Almond Board officials is reimbursed out of the handlers' assessments. For these reasons, the new credit-back program also fails the "no more extensive than necessary" test.

Freedom of Association

Cal-Almond I found it unnecessary to review the record in terms of the Supreme Court's test for permissible government restriction on Freedom of Association, "because we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard." 14 F.3d at 436.

In this proceeding, the same situation has occurred, and further consideration of the Freedom of Association issue is again unnecessary.

Disposition of the Petitions

The Almond Order's Promotion Program is determined not to be in accordance with law from 1986 through the present, in that it failed to directly advance and was more extensive than necessary to advance the government interest asserted in

justification of its regulation of petitioners' commercial speech. The detailed findings of fact and conclusions in support of this disposition are as follows:

Findings of Fact

A. The Petitioners

Cal-Almond

1. Cal-Almond, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R Part 981). The Almond Order's Promotion Plan requires Cal-Almond to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Cal-Almond seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Cal-Almond for the 1992-1993 marketing year and every subsequent marketing year.

2. 65% of the almonds Cal-Almond handles are sold into the export market, and 35% into the domestic market. In 1988, Cal-Almond desired to and did expand its product lines to provide more manufactured products. Most almond handlers ship only "brown almonds" (almonds that are not manufactured), and Cal-Almond extensively increased its product lines beginning in 1988 to manufacture items that are sliced, diced and blanched. (Dryden; Ex. CA3, par. 3)

3. In 1989, approximately 50% of Cal-Almond's product was manufactured into specialty products which include

blanched, sliced, diced and super premium brown almonds. In 1993-1994 Cal-Almond had increased the amount of almonds it handled to approximately thirty million pounds; approximately 80% of these almonds were manufactured into specialty products. For the 1994-1995 crop year, Cal-Almond anticipates handling approximately forty million pounds with approximately 80% of that product being manufactured into specialty products. (Dryden; Ex. CA3, par. 3)

4. It is also important to Cal-Almond to develop a reputation among buyers and customers of being able to produce its products, in a timely manner and at competitive prices, which are used in the manufacture of ice creams, cereals, bakery goods, candy bars and other confectionery items. (Dryden; Ex. CA3, par. 5)

5. Cal-Almond, at considerable expense, has so successfully developed the Cal-Almond label, that many buyers and brokers have called Cal-Almond at the urging of an end user who wants the Cal-Almond label because of its assurance of quality, timeliness of shipment and competitive price. (Dryden; Ex. CA3, par. 5)

6. In 1988, Cal-Almond sold its manufactured and specialty items, at 2-5 cents less per pound than Blue Diamond's price to customers. Today, buyers are willing to pay more for Cal-Almond's product than Blue Diamond's product. (Dryden; Ex. CA3, par. 5)

7. In 1988, Cal-Almond expanded its facilities to house newly purchased manufacturing equipment that included blanching units and all the cutting units to make the product into sliced and diced type almonds. The cost of that equipment was in

excess of one million dollars, plus the cost of the propane tanks to heat the blanching water, plumbing, recycled water systems and meeting the necessary permit requirements of the county. (Dryden; Ex. CA3, par. 6)

8. Since 1988, Cal-Almond has expanded its roasting trade from pure "oil" roasting to dry roasting, because several of Cal-Almond's buyers in the bakery and candy bar trade desired dry roasted almonds; and in 1992 Cal-Almond purchased dry roasting equipment for $200,000.00. (Dryden; Ex. CA3, par. 6)

9. Cal-Almond has spent approximately $500,000.00 for additional equipment for a blanching, slicing and dicing unit to supply greater quality assurance for the customer's specifications. In the summer of 1994, Cal-Almond spent approximately $150,000.00 for the most modern dicing unit, again to meet buyer specifications and at the customer's request. (Dryden; Ex. CA3, par. 6)

10. Cal-Almond spent an additional $350,000.00 for additional cold storage warehousing so that Cal-Almond would have the extra ability to market almonds throughout the crop year. (Dryden, Ex. CA3, par. 6)

11. Being able to market throughout the crop year allows Cal-Almond to take advantage of the highest prices during the crop year without being "forced to sell" at an earlier time or during times when the market price is lower. (Dryden; Ex. CA3, par. 6)

12. In the summer of 1994, Cal-Almond spent an additional one million dollars to improve and expand its shelling line, and an additional warehouse was being built at the time of the hearing at an expense of $150,000.00. (Dryden; Ex. CA3, par. 6)

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13. In 1994, Cal-Almond also put in an LMC precleaning and cleaning line at the cost of $350,000.00, and did so because that line is the "Cadillac" of that equipment. This was done in order to meet the certification requirements of all the major domestic and export buyer specifications, which are extremely rigid. (Dryden; Ex. CA3, par. 7)

14. During tours that Dryden facilitated for visiting buyers, brokers arid customers, the buyers would suggest added safeguards and extra "cleanliness" developments, stating that they would be interested in purchasing more product from Cal-Almond if it was able to add this extra equipment. Cal-Almond complied with these requests. (Dryden; Ex. CA3, par. 7)

15. As the result of a buyer request, Cal-Almond put in new flooring in one of its buildings for $75,000.00, and it expanded the floor space of its roasting operation in order to allow the loading and unloading of almonds without the almonds facing the elements from outside. In order to meet further buyer specifications, Cal-Almond added eight more electronic sorting machines at approximately $40,000.00 per machine to increase the quality of its product. (Dryden; Ex. CA3, par. 7)

16. Cal-Almond's Quality Assurance and Production Manager, Bill Dryden has spent approximately 30% of his time with buyers and customers. He has conducted tours of Cal-Almond's facilities for buyers and customers; reviewed their rigid specifications for products, and make adjustments for purchasers in order to comply with their specifications. When these customers arrive, Cal-Almond lavishly entertains them. The customers are flown in Cal-Almond airplanes to Yosemite National Park, taken to breakfast, lunch and dinners and otherwise fully hosted at Cal-Almond's expense. (Dryden; Ex. CA3, par. 8)

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17. At least once a year, Dryden and Tyler Angle, an officer of Cal-Almond and the overall manager of Cal-Almond, travel to Europe and other places in order to meet with the customers, buyers and brokers, and Cal-Almond has found that these visits are particularly valuable in promoting the Cal-Almond product and promoting almonds in general. (Dryden; Ex. CA3, par. 8)

18. Dryden is constantly on the telephone to buyers and customers to promote Cal-Almond's product, listen to the concerns of buyers and customers and provide assurances that Cal-Almond can continue to meet buyer specifications. These are extremely important to Cal-Almond's promotion of its almonds. Cal-Almond has upgraded its computer systems at considerable expense to accommodate customer shipping and label making. (Dryden; Ex. CA3, par. 8)

19. Historically, foreign and domestic buyers of almonds would buy almonds in their brown natural state, and those buyers and customers would blanch, slice, dice and otherwise manufacture the almonds for resale or use in ingredient products. By virtue of Cal-Almond's expensive quality control efforts and equipment and its one-on-one salesmanship, Cal-Almond now provides that service which has increased Cal-Almond's profits. (Dryden; Ex. CA3, par. 9)

20. Buyers have learned as a result of Cal-Almond's special expertise, quality control and equipment, that Cal-Almond, using its own facilities and machinery, can provide those buyers and customers with a better product than the buyers and customers can with their own manufacturing equipment. It has taken a great deal of time and money to convince the buyers and customers to utilize Cal-Almond's services, but that is one of the reasons Cal-Almond has increased the tonnage that it

manufactures from approximately 50% in 1989 with far less tonnage, to approximately 80% now with far more tonnage. (Dryden; Ex. CA3, par. 9)

21. None of the expenditures for equipment, product enhancement or personal selling to the customers can be approved for credit under the Board's advertising program, either under the creditable advertising program or the credit-back program. (Dryden; Ex. CA3, par. 9)

22. Dryden has worked with customers to develop new products and new manufacturing techniques in order to provide the buyers and customers with even more alternatives for almonds. (Dryden; Ex. CA3, par. 9)

23. If Cal-Almond were to assist one of its customers or buyers in advertising a product containing almonds, Cal-Almond could only receive credit on that advertisement up to the amount of the net weight of the almonds in the packages, which on most occasions is less than 10% of the net weight, even though almonds being bought as ingredient items in other products has caused the increase in the demand and consumption dramatically over the years. (Dryden; Ex. CA3, par. 10)

24. Cal-Almond believes that its buyers and customers are not interested in television, newspaper, magazine or radio advertisement; they want personal service, quality product, and new techniques for making more types and cuts of almonds and meeting the buyer's specifications. (Dryden; Ex. CA3, par. 11)

25. If the Almond Order's Promotion Program did not exist, Cal-Almond would continue to promote its product in the method and manner described in the preceding paragraphs, but

would have more money for it if not required to pay advertising assessments of anywhere from $400,000.00 to $600,000.00 per year.

26. There is no method of advertising or promotion available to Cal-Almond for which Cal-Almond could receive credit under the Almond Board regulations which Cal-Almond believes is to its benefit. (Dryden; Ex. CA3, par. 12)

27. Because of Cal-Almond's quality and reputation, many customers want Cal-Almond's product and label more than they want their own private label, and some of the buyers have Cal-Almond provide them with twenty-five and fifty pound containers bearing the customer's private label when the customer must utilize its own private label. (Dryden; Ex. CA3, par. 13)

28. There are several individuals at Cal-Almond who are constantly on the telephone with buyers and customers or meeting with buyers and customers to increase almond sales. (Dryden; Ex. CA3, par. 13)

29. Under the new credit-back rules, if Cal-Almond's assessment is $400,000.00, Cal-Almond would have to spend $600,000.00 in order to receive that credit, but the available forms of advertising and promotion under the current marketing order rules are in Cal-Almond's opinion, a complete waste of money to Cal-Almond. (Dryden; Ex. CA3, par. 13)

30. For the 1992-1993 crop year, Cal-Almond's creditable advertising assessment was $366,431.83. (Ex. CA2)

31. Cal-Almond's credit-back advertising assessment for the 1993-1994 crop year was $288,440.30. (Ex. CA1)

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32. Although Cal-Almond's Purchasing Agreements specify that the advertising assessments are to be deducted from its payments to growers, its controller has testified that since at least July of 1991, Cal-Almond has not deducted the Almond Board advertising assessment from any of its growers' returns. (Nunes (controller of Cal-Almond, Inc.); Tr. 1937-1939 and Ex. CA5, page 3)

33. From 1990-1992, when Dr. Young was a food technologist for Dreyers Ice Cream (Tr. Young 1406-1407), Dreyers never received any promotional material from the Almond Board. (Tr. Young 1432)

34. Because of Dreyers stringent quality control requirements, out of all the handlers that attempted to supply Dreyers, only Cal-Almond was chosen. (Tr. Young 1433-1436, 1437-1438)

35. The percent of almonds in Dreyers ice cream runs 3%-6%. (Tr. Young at 1435)

36. The three Dreyers ice creams that contain almonds are extremely good sellers for Dreyers, and those specific varieties are not advertised. (Tr. Young 1438-1439)

37. Dreyers' director of quality assurance visited all of the plants that were in contention for the Dreyers business, in order to verify compliance with Dreyers' specifications. (Tr. Young 1440-1441)

38. Clyde Angle, president of Cal-Almond, Inc., has been a grower of almonds all of his life and has been a handler for twenty years. (Tr. Angle 2164-2166) He believes that Cal-

Almond was able to grow so fast because it kept its growers happy, and because of its personal service to its buyers. (Tr. Angle 2167-2168)

39. Cal-Almond has also developed an almond flour, which the Almond Board never advertises. Cal-Almond developed its own buyers for almond flour, and has developed a sizeable market for almond flour. (Tr. Angle 2169-2170)

40. Cal-Almond runs its blanching operation 365 days a year around the clock to keep up with the demand for Cal-Almond blanched products. (Tr. Angle 2171-2172)

41. Mr. Angle further testified that for the twenty years that Cal-Almond has been in business, there has been only one year that Cal-Almond did not pay its growers more than Blue Diamond paid theirs. (Tr. Angle 2174) Cal-Almond loans money to growers at a lower interest rate than offered by banks, and also loans money to growers who cannot, for credit reasons, borrow money needed to stay in business. In 1993-1994, he testified that Cal-Almond loaned growers in excess of five million dollars in order to keep them in business. (Tr. Angle 2174-2175) He further testified that numerous buyers and government officials have, after observing Cal-Almond's plant, told him that its plant is the cleanest operation in the industry. (Tr. Angle, 2177) In Mr. Angle's opinion, none of the ways the Almond Board allows a handler credit against the advertising assessments would be beneficial to Cal-Almond. If the Almond Board did not have advertising regulations, Cal-Almond would, Mr. Angle testified, continue to promote its product, and would have more money to do so. (Tr. Angle 2184-2185)

Treehouse Farms, Inc.

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42. Treehouse Farms, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Treehouse Farms to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Treehouse Farms seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Treehouse Farms for the 1986-1987 marketing year and every subsequent marketing year.

43. Treehouse is a mid-sized almond handler that sells virtually all of its almonds for use as ingredients in other products. Treehouse does not sell any retail products. (Fitzgerald; Ex. TREE9, par. 2)

44. Treehouse's sales are effectuated through almond brokers to manufacturers of products that use almonds as ingredients; and Treehouse is therefore in the almost identical marketing situation as Cal-Almond, Inc., which is one of Treehouse's competitors. (Fitzgerald; Ex. TREE9, par. 2)

45. Approximately 80% of Treehouse's sales are sold into the foreign market. Treehouse's foreign sales have risen dramatically, whereas its domestic sales have risen only gradually. (Fitzgerald; Ex. TREE9, par. 3; Fitzgerald; Ex. TREE5)

46. Treehouse opposes the Almond Board's generic advertising program and views the Board's program as having had no value to Treehouse. (Fitzgerald; Ex. TREE9, par. 4)

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47. Treehouse believes that what sells its almonds is a fair price, Treehouse's efforts to contact customers, visiting potential customers at their facilities throughout the United States and overseas, showing Treehouse's facilities to potential customers, encouraging potential customers to visit Treehouse's facilities, and creating new and improved products by investing in new and improved technologies and quality control, none of which is assisted by the Board's generic advertising and promotional efforts. (Fitzgerald; Ex. TREE9, par. 4; Carey; Ex. TREE10 par. 2)

48. In Treehouse's opinion, none of its efforts to sell its product are assisted at all by the Board's creditable advertising program or the new credit-back program, and Treehouse cannot receive credit for its expenditures prior to 1993 that it believes promoted the sale of its almonds. (Fitzgerald; Ex. TREE9 paras. 4 & 5)

49. Prior to 1993, Almond Board regulations did not permit Treehouse to receive any credit for advertising products that contain Treehouse almonds (such as candy or cereal). Moreover, the manufacturers that sell these candies and cereal know how to advertise their products better than Treehouse would, and Treehouse's customers already know that they want to purchase almonds, but the most important question for them is whether Treehouse can deliver quality almonds at a fair price. (Fitzgerald; Ex. TREE9 par. 5)

50. In Treehouse's opinion, the Almond Board's generic print advertising (Fitzgerald; Ex. TREE7) does not help sell Treehouse's almonds, and the branded forms of advertising available under the regulation would have a minimal effect, if any, on Treehouse's sales because of the nature of Treehouse's business. (Fitzgerald; Ex. TREE9 par. 6)

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51. Treehouse does minimal "advertising" but for name recognition purposes only. Treehouse does not believe this advertising has had any value to Treehouse in identifying potential new customers. (Fitzgerald, Ex. TREE9 par. 7)

52. The amount of advertising assessment Treehouse has paid to the Almond Board for the crop years 1986 through the 1993-94 crop year are contained in Fitzgerald; Ex. TREE6 and TREE8, except for the 1987-1988 crop year, which Treehouse assumes the Almond Board would have. (Fitzgerald; Ex. TREE9 par. 8)

53. When almond prices went up substantially in 1993, many buyers expressed to Treehouse that if the high prices continued in that range, they would consider removing almonds from their products as ingredients. (Tr. Fitzgerald 71)

54. Although Treehouse's Purchasing Agreements specify that the advertising assessments are to be deducted from its growers, its president testified that Treehouse does not deduct advertising assessments from its growers returns, and has not from and including the 1987-88 crop year through the current crop year. (Tr. Fitzgerald 81-84, 87-88; Ex. TREE 11)

55. In Treehouse's opinion, as stated by its president, generic advertising by the Almond Board does not increase the consumer demand for almond products; what sells almonds is packers spending time with their customers and talking to the research and development departments of those customers. (Tr. Fitzgerald 115; Carey Ex. TREE10, par. 2)

56. Treehouse has developed a new product that is a special slivered almond that is sold into Japan for a dried fish product,

and the Japanese customers have expanded their business into that product which has sold more almonds, and Treehouse has spent funds to accommodate the Japanese buyer in this endeavor. (Tr. Fitzgerald 116-117)

57. Treehouse does not consult with the Almond Board or any public relations or advertising committee or with their growers as to how Treehouse should market its almonds, because Treehouse knows best how to market its almonds. (Tr. Fitzgerald 125)

Gold Hills Nut Company, Inc.

58. Gold Hills Nut Company, Inc. is a handler of California almonds and subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Gold Hills to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Gold Hills seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Gold Hills for the 1992-1993 marketing year and every subsequent marketing year.

59. Bill Phipps is the president, chief financial officer and owner of Gold Hills Nut Company, Inc. which began handling almonds in 1986. (Phipps; Ex. GH3, par. 1)

60. For the 1992-93 crop year, Gold Hills handled 5,632,793 pounds of almonds, and all of it was sold into the export market. (Phipps; Ex. GH3, par. 3; GH1)

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61. For the 1993-94 crop year, Gold Hills handled 9,997,462 pounds of almonds and 100% of that product was exported. (Phipps; Ex. GH3, par. 3; GH2)

62. Approximately twenty per-cent of Gold Hills' crop that it handles is owned by Phipps. (Phipps; Ex. GH3, par. 3)

63. For the 1992-93 crop year, almost all of Gold Hills creditable advertising assessment was spent buying 1/2 ounce packages of almonds from the Almond Board to be distributed to schools and churches. Gold Hills bought them in order to receive the "credit" under the advertising regulations, but they did not at all promote consumption of almonds nor increase Gold Hills' returns nor the returns to its growers. (Phipps; Ex. GH3, par. 4)

64. In Mr. Phipps' opinion, the expenditure of the advertising assessment was a complete waste of money to Gold Hills. (Phipps; Ex. GH3, par. 4)

65. For the 1994-95 almond crop year, Gold Hills will handle approximately fifteen million pounds. In 1994 Gold Hills spent approximately one and a half million dollars on equipment specifically designed to provide high quality manufactured items to compete in the export market with Spanish manufactured products, and Gold Hills will spend substantial sums of money targeting those buyers who had previously bought Spanish manufactured products. It will cost Gold Hills a substantial sum of money targeting those buyers, but neither the equipment purchases nor the expenditures to target those buyers are creditable under the credit-back rules or the previous creditable advertising rules. (Phipps; Ex. GH3, par. 5)

66. Domestic brand advertising does nothing for Gold Hills

since Gold Hills does not sell in the domestic market, and Gold Hills does not have a "brand" that goes on store shelves, but instead sells all of its almonds to be used in ingredient items. (Phipps; Ex. GH3, par. 6)

67. Over the last three years Gold Hills has, at its cost, entertained a number of buyers and customers who have come to the Gold Hills facility so that Gold Hills can prove to those customers that Gold Hills can provide the best quality product possible with timely shipments and excellent service. None of those expenditures are creditable under the Board's advertising program. (Phipps; Ex. GH3, par. 6)

68. Gold Hills believes that its buyers overseas know what the best markets are for the products containing almonds, and they are not interested in any Almond Board advertisement. (Phipps; Ex. GH3, par. 6)

69. The new credit-back program has expanded the ways in which a handler may receive credit, but Gold Hills believes the new regulations to be even more burdensome in that a handler can receive only two-thirds credit for its advertising and promotion. (Phipps; Ex. GH3, par. 7)

70. Gold Hills believes it knows best how to market its product in its own targeted market; that the competitive returns that Gold Hills has paid its growers have not been caused by any Almond Board advertising program; and that if the advertising program did not exist, Gold Hills could make more money and could pay its growers more money. (Phipps; Ex. GH3, par. 7)

71. Gold Hills does not charge its growers for the Almond Board assessments. (Phipps; Ex. GH3, par. 3; GH4 through GH9; Tr. Phipps 1911-1913)

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72. Gold Hills does not only contact buyers that already buy almonds; Gold Hills has contacted customers that have not previously bought almonds, and has been able to provide new customers with the type of product those customers wanted. (Phipps 1916-1918)

73. Gold Hills has always paid its growers more money per pound than Blue Diamond pays theirs. (Tr. Phipps 1923-1924)

74. A number of growers have brought product to Gold Hills because Gold Hills is fighting the advertising program. (Tr. Phipps 1926-1927)

75. Gold Hills has also slightly discounted its price to buyers overseas who advertise the product which is made from its almonds. Gold Hills believes this to be a good investment because the buyer will buy more of Gold Hills' product when consumption increases as a result of the buyers' specific advertising program, but this discount is not creditable under the advertising regulations. (Tr. Phipps 1929-1931)

Frazier Nut Farms, Inc.

76. Frazier Nut Farms, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Frazier Nut to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Frazier Nut seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Frazier Nut, for

the 1992-1993 marketing year and every subsequent marketing year.

77. Jim Frazier is the president of Frazier Nut Farms, Inc., an almond handler, which in 1992 handled 1,290,912 pounds and for the 1993-94 crop year handled 870,010 pounds. (Frazier; Ex. FN3, par. 1, FN1 & FN2)

78. Frazier sells brown almonds and most of its products are exported. Frazier finds that the best way to promote its product is to meet with buyers, have one-on-one sales meetings with those buyers and make plant improvements. (Frazier; Ex. FN3, par. 2)

79. Frazier is a much larger walnut processor than it is an almond processor, but many of Frazier's buyers buy both. Under the 1992-93 creditable advertising assessment, Frazier could not obtain credit for promoting almonds along with "competing nuts", which would include walnuts. (Frazier; Ex. FN3, par. 2)

80. Under the new credit-back rules, which restricts credits to two-thirds of the amount spent, a handler can receive credit for the promotion of both walnuts and almonds, but the amount of the credit is further reduced to the percentage of the net weight of the product containing almonds. (Frazier; Ex. FN3, par. 2)

81. In Mr. Frazier's opinion, neither the Almond Board, USDA, nor competitors sitting on the Almond Board know how to promote Frazier's product, and none of the Board's promotion or advertising assists Frazier's sales. (Frazier; Ex. FN3, par. 2)

82. If there were no Almond Board advertising

assessments, Mr. Frazier states he would utilize that amount of money to increase the quality control of its product, and expand the types of products that Frazier could process to increase his customer base. (Frazier; Ex. FN3, par. 2)

83. Mr. Frazier believes that advertising in magazines, radio, TV or newspapers would not help Frazier whatsoever to promote its products, as Frazier has no "store shelf' almonds, but sells its products to buyers who use the almonds as ingredients in other commodities. (Frazier; Ex. FN3, par. 2)

84. Mr. Frazier further testified that in his opinion, for every dollar Frazier has to spend on the Board mandated advertising program, not only does it lose that dollar because there is no benefit to Mr. Frazier from the Board's promotion programs, but it also loses the profits it could make on that dollar if spent on the ways that would increase the sale of its almonds; however none of those ways would be creditable under the Board regulations. (Frazier, Ex. FN3, par. 2)

85. Frazier does not deduct Almond Board assessments from its payments to growers. (Frazier Tr. 212)

86. Mr. Frazier believes that Almond Board generic advertising directed to the export market is of no benefit to Frazier because Frazier can sell everything that Frazier handles without any advertising. He testified that Frazier has more inquiries and more interest in its product than Frazier can possibly supply. (Tr. Frazier 213)

87. Mr. Frazier further believes that the Frazier name itself generates the interest in product, not advertising. (Tr. Frazier 214-215)

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Beard's Quality Nut Company

88. Beard's Quality Nut Company is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Beard to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Beard seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Beard, for the 1986-1987 marketing year and every subsequent marketing year.

89. Steve Beard is the manager of the almond division of Beard's Quality Nut Company, an almond handler since 1969, and was the chairman of the public relations and advertising committee for the Almond Board for the preceding two years. (Beard BQN12, par. 1)

90. Mr. Beard testified that the public relations and advertising committee and the Almond Board consist of both growers and handlers, but growers do not know how to market almonds, yet they vote on the Board and at the public relation committee meetings with respect to where Almond Board money should be spent on advertising and promotion. (Beard BQN12, par. 1)

91. From 1986 to the present, Beard spent its creditable advertising assessment dollars and its credit-back dollars, not because Beard believed that it was of any benefit spending the money under the very restrictive creditable advertising regulations or the new credit-back advertising regulations, but

because if Beard did not spend the money it would be paid to the Board, and the Board would then spend the money advertising almonds as snacks to consumers, which benefitted Blue Diamond, not Beard. (Beard BQN12, par. 2)

92. Beard has no store shelf almonds for snacks or baking, but instead its almonds are marketed throughout the world, approximately 70% going to the foreign market and 30% to domestic sales, all as whole brown almonds used as ingredients. (Beard BQN12, par. 2)

93. In Steve Beard's opinion, none of Beard's compelled expenditures of dollars for advertising benefitted Beard or its growers, it only cost Beard money. (Beard BQN12, par. 2)

94. Beard has spent an enormous amount of time and money for which it could not receive credit either under the creditable advertising rules or the credit-back rule. These expenditures included personal contact with many customers and direct mailing to those customers. Beard also attempted to influence domestic customers to adjust their promotions to fit the Almond Board's rules of joint advertising, but its efforts were hampered in that the advertising regulation precluded credit for joint advertising if the products included "competing nuts" or did not make up at least 50% (fifty percent) of the net weight of the package, or if Beard's own label was not on the package. (Beard BQN12, par. 3)

95. In almost all of the years at issue (1986-87 through the 1994-95 crop years), the compelled advertising assessment to Beard was anywhere from $50,000.00 per year to over $100,000.00 per year, and, in Steve Beard's opinion, none of those expenditures benefitted Beard. (Beard BQN12, par. 3)

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96. During this same period of time Beard has spent a substantial sum of money improving its facilities, purchasing new equipment, purchasing new facilities and increasing the efficiency level and the quality of Beard's product so that it would open more markets to Beard, but the sums of money spent are not creditable under the Board's regulations, even though said expenditures have improved dramatically the marketability of Beard's almonds. (Beard BQN12, par. 3)

97. Steve Beard testified that if Beard did not have to spend money on the Almond Board's programs, it would be used for personal contact with buyers with follow-up promotional materials, ideas to tailor the customer's product with available types of almonds, working on quality line extensions at Beard's facility in order to produce a product that would appeal even more to the industrial users and customers; Beard sponsored seminars; and more travel to meet more buyers. Beard would also have more buyers and users hosted at Beard's facility. None of these forms of expenditures is creditable under the advertising regulations. (Beard BQN12, par. 5)

98. In Steve Beard's opinion, Beard has received absolutely no economic benefit from the advertising program from and including 1986 to the present, (the years under challenge by Beard) but instead it has cost Beard hundreds of thousands of dollars. (Beard BQN12, par. 9; Tr. Beard 176)

99. Beard's credit-back advertising assessment, its creditable advertising assessments and its administrative assessments for the 1989-90 crop year through the 1993-94 crop year are set forth in exhibits BQN8 through BQN10.

100. Beard does not deduct assessments from its grower returns. (Tr. Beard 134-136)

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Monte Cristo Packing Company

101. Monte Cristo Packing Company is a handler of California almonds and subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Monte Cristo Packing Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. *Monte Cristo* seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Monte Cristo Packing Company for the 1986-1987 marketing year[6] and every subsequent marketing year.

102. Theron Shamgochian is the president of Monte Cristo Packing Company. Mr. Shamgochian supplied a written declaration which was to be used as his direct testimony that would be subject to cross-examination at the oral hearing. However, Mr. Shamgochian became personally unavailable and did not take the witness stand. His statement (Ex. MC8) was received an evidence but it is unsworn and was not subject to cross-examination. In it he asserts a claim not only to all advertising assessments paid since 1980 but also to that portion of the administrative assessment which he asserts was used by the Board for advertising and promotion. Inasmuch as his attorney has proposed that refunds should start with the 1986-87 year, and there is no sworn testimony to support redress for prior years, Monte Cristo's claim is being limited to the period 1986-87 to present. There is insufficient evidence to support

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6. *See* footnote 1 *supra*.

petitioner's claim that a portion of the administrative assessments were partially applied to advertising and promotion by the Board and should therefore also be eventually refunded[7]. During the creditable marketing years of 1986-1987, through 1991-1992, the opposite was true; a portion of the advertising assessments was applied to reduce subsequent administrative assessments. Other than Mr. Shamgochian's unsworn statement which was not subjected to cross-examination, there is no credible evidence in this record that any part of the administrative assessments were applied to advertising and promotion by the Board. For these reasons, these proposed findings by Monte Cristo have been rejected. The following findings, however, concerning Monte Cristo's general operating practices and the billings it received for advertising assessments from the 1986-1987 marketing year to present, have been made on the basis of Mr. Shamgochian's written declaration and the documents attached to it.

103. Monte Cristo sells all of its almonds for ingredient purposes. It sells a substantial amount of its product in Japan, Hong Kong, Korea, Macao and Mexico.

104. The Almond Board does not advertise in Mexico, and Monte Cristo's costs to enter that market were not creditable under either the credit-back or the former creditable advertising rules.

105. Mr. Shamgochian, his son and other representatives of Monte Cristo frequently travel overseas to Europe, Russia,

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7. Several other petitioners have made similar claims against the administrative assessments they paid, but those claims are also found to be unsupported by evidence that part of those assessments were used to pay for generic advertising and promotion.

Japan and Korea to meet with potential customers, and none of those travel expenses were creditable under the Almond Order's Promotion Plan.

106. Monte Cristo engages in lavish client entertainment which includes the hosting of a golf tournament in Japan; the annual hosting, since 1984, of a golf tournament and dinner in America for the entire almond industry, which includes growers, packers, brokers, exporters, importers, candy industry representatives and foreign users; supplying private airplanes. limousines and private automobiles to visiting almond buyers and paying the cost of their stay in California; and providing vacation stays for brokers, importers and users.

107. Monte Cristo has spent over two million dollars in the last ten years on plant improvements in respect to its huller, sizing operation, electronic color sorters, length graders, picking rooms and cold storage facilities, so that Monte Cristo could be certified by all major domestic candy manufacturers, including M&M Mars, Hershey Chocolates, Sees Candies, Russell Stover and Banner. The expenses for these capital improvements are not creditable under the Almond Board's regulations.

108. If the Almond Order's Promotion Program were discontinued, Monte Cristo would continue to promote its product.

109. For 1986-87, Monte Cristo's creditable advertising assessment was as follows:

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12,762,031 kernel pounds	
at 2 1/2 cents per lb:	$319,050.77
Credit was given for:	$290,584.35
Balance actually paid to Board:	$ 28,466.42

110. For 1987-88, Monte Cristo's creditable advertising assessment was as follows:

33,616,080 kernel pounds	
at 2 1/2 cents per lb:	$840,402.00
Credit was given for:	$840,402.00
Balance actually paid to Board:	- 0 -

111. For 1988-89, Monte Cristo's creditable advertising assessment was as follows:

36,407,188 kernel pounds	
at 2 1/2 cents per lb:	$910,179.70
Credit was given for:	$910,179.70
Balance actually paid to Board:	- 0 -

112. For 1989-90, no almonds handled that marketing year.

113. For 1990-91, Monte Cristo's creditable advertising assessment was as follows:

5,496,879 kernel pounds	
at 2 1/2 cents per lb:	$137,421.98
Credit was given for:	$137,361.91
Balance actually paid to Board:	$ 60.07

114. For 1991-92, Monte Cristo's creditable advertising assessment was as follows:

8,123,862 kernel pounds	
at 1 3/4 cents per lb:	$142,167.59
Credit was given for:	$142,167.59
Balance actually paid to Board:	-0-

115. For 1992-93, Monte Cristo's creditable advertising assessment was as follows:

8,870,776 kernel pounds	
at 1 1/4 cents per lb:	$110,884.70
Credit was given for:	$110,884.70
Balance actually paid to Board:	-0-

116. For 1993-94, Monte Cristo's credit-back advertising assessment was based on 11,015,717 kernel pounds handled at a rate of 1 cent per pound. This totaled $110,015,717. How much credit was given against this amount and how much was actually paid to the Board has not been shown.

Amaretto Orchards

117. Amaretto Orchards is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Amaretto Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Amaretto Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Amaretto Orchards for the 1986-1987 marketing year and every subsequent marketing year.

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118. Bruce Beretta is a general partner of Amaretto Orchards, which became a handler of almonds during the 1986-1987 season. Amaretto Orchards handles between approximately 1 million pounds to approximately 1.8 million pounds, and only markets its own tonnage grown. (Beretta AO1, par.1; Beretta, Tr. 1954-1956)

119. Approximately 70% of Amaretto's product is exported; it has no retail brand; it sells brown almonds to be used as ingredients in manufactured products. (Beretta AO1, par. 1)

120. Mr. Beretta assumes that the Almond Board has records of the tonnage and assessment amounts paid by Amaretto Orchard from the 1986-87 season through the 1993-94 crop year. (Beretta AO1, par. 1)

121. From 1986 through the 1992-93 crop year, when the creditable advertising program, was in effect, Amaretto typically purchased half ounce packages of snack almonds from the Almond Board to give them to charities so that Amaretto could receive 150% credit for those purchases pursuant to the Board's regulations, but the distribution of the charitable packs did not promote Amaretto's returns nor did it increase buyer demand for Amaretto's product. (Beretta AO1, par. 2)

122. Mr. Beretta testified that, on a couple of occasions, Amaretto Orchards did do some "advertising" pursuant to the Almond Board regulations. However, Amaretto would not have engaged in this "advertising", but for the Promotion Program. In Mr. Beretta's opinion, there was no creditable activity under the Program which would effectively promote or advertise Amaretto's product. (Beretta AO1, par. 2)

123. Mr. Beretta further testified that in his opinion, not only was every dollar spent on advertising and promotion pursuant to the Almond Board's regulations lost as such, but also it left Amaretto with one dollar less to spend in ways that would promote its product. (Beretta AO1, par. 2)

124. Amaretto believes that the best way to promote its product is direct one-on-one salesmanship with buyers and customers; bringing buyers to its plant, entertaining the buyers while visiting its plant, and by travel overseas by Amaretto's representatives to promote its product. (Beretta AO1, par. 3)

125. Mr. Beretta testified that he has concluded that the Almond Board's generic advertising and promotion program has not assisted Amaretto, and that its payment to the Almond Board for its generic program is a complete waste of money. He further stated that Amaretto Orchards knows how to promote its product, not the Almond Board nor USDA, and if Amaretto had the money instead of having to pay it to the Almond Board, Amaretto would first use it to increase the quality control system at its facility in order to expand the number of potential buyers of its product. (Beretta AO1, par. 3)

126. On past occasions Amaretto paid the money directly to the Board for the creditable advertising assessment, in an attempt to take advantage of the 150% credit for early payments to the Board, but the Board primarily used the money for a promotional program which was geared towards advertising consumer retail almonds, a market which Amaretto did not have. (Beretta AO1, par. 3)

127. Mr. Beretta testified that in his opinion, under the current credit-back regulations, there is no permissible form of

promotion and advertising that would do Amaretto any good and be economically beneficial to Amaretto. (Beretta AO1, par. 3)

Del Rio Nut Company

128. Del Rio Nut Company is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Del Rio Nut Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Del Rio Nut Company seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Del Rio Nut Company for the 1986-1987 marketing year and every subsequent marketing year.

129. David Arakelian is the president and chief executive officer of Del Rio Nut Company and since 1987 has been a handler of almonds. (Arakelian DRN3, page 2)

130. The principal markets for Del Rio's almonds are food manufacturers and export organizations. Del Rio has no retail sales. (Arakelian DRN3, page 2)

131. Del Rio's creditable advertising assessment for the crop years 1987-88 through the 1992 crop year are stated at page 2, exhibit DR3.

132. Mr. Arakelian testified that the forms of credit available under the Almond Board regulations were, in his opinion, of no benefit to Del Rio, and did not compensate Del Rio

for the direct contact with buyers that has been the most useful form of marketing and selling Del Rio's almonds. (Arakelian DRN3, page 3)

133. Mr. Arakelian further testified that he believed that the forms of credit allowed under the new credit-back program have not been sufficiently expanded to provide any significant business benefit to Del Rio. He perceives the individual efforts of Del Rio in marketing its own almonds to be the way that has most effectively expanded the demand for its product rather than advertising under the regulations. (Arakelian DRN3, pages 3 and 4)

134. For the 1993-94 crop year, Del Rio's advertising assessment was $42,168.05. Mr. Arakelian testified that in his opinion, there are no forms of advertising and promotion allowable under the credit-back rules that would allow Del Rio to effectively spend that money. (Arakelian DRN3, page 4)

135. Del Rio does not charge most of its growers any of the assessments imposed by the Almond Board and USDA. However, in respect to some 5% of the tonnage it handles, Del Rio does custom processing on consignment, and does charge those growers the assessments. (Arakelian Tr. 196, 199)

136. Del Rio's promotion consists of Mr. Arakelian selling the positive qualities of the Del Rio company and its product to its customers. Mr. Arakelian personally visits customers, and has customers visit the Del Rio facility, and on one occasion he flew 4,000 miles to visit a company which was involved in importing associated products, but was not at that point bringing in almonds. (Arakelian Tr. 201-202)

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Monte Vista Farming

137. Monte Vista Farming is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Monte Vista Farming to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Monte Vista Farming seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Monte Vista Farming for the 1986-1987 marketing year and every subsequent marketing year.

138. James Crecelius is the sole owner of Monte Vista Farming Company, which since 1985, has primarily handled California almonds. The number of pounds handled by Monte Vista is stated by Mr. Crecelius at page 2 of his written declaration. (DRN4, pg. 2)

139. Monte Vista's almonds are sold to food manufacturers and export organizations and have never been sold for retail sales. (Crecelius DRN4 page 2)

140. In Mr. Crecelius' opinion, none of the forms of advertising permitted under the Almond Board regulations were of any benefit to Monte Vista in the marketing of its almonds, and since most of Monte Vista's almonds are sold in the export market the personal selling relationships with buyers is the most important aspect of selling those almonds, which is not creditable under the Board's regulations. (Crecelius DRN4 page 31; Crecelius Tr. 185-186)

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141. In the opinion of Mr. Crecelius, there is no significant business benefit for Monte Vista under the Almond Board's new credit-back regulations which took effect in the 1993-94 crop year. (Crecelius DRN4 page 3)

142. Mr. Crecelius testified that Monte Vista's individual selling efforts to its buyers is what sells Monte Vista's almonds, not advertisements taken out pursuant to the regulations. (Crecelius DRN4 page 4)

143. Monte Vista's advertising assessment for the 1993-94 crop year pursuant to the Almond Board is $65,561.87, and Mr. Crecelius believes that if Monte Vista spent that sum on the permissible forms of advertising, it would not benefit Monte Vista's sales. (Crecelius DRN4 page 4; Crecelius Tr. 184-185)

Rotteveel Orchards

144. Rotteveel Orchards is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Rotteveel Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Rotteveel Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Rotteveel Orchards for the 1986-1987 marketing year and every subsequent marketing year.

145. John Rotteveel is a partner with his father. They grow and market California almonds, and have been almond handlers since 1986. (Rotteveel RO9, par. 1)

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146. Rotteveel's advertising assessments for the 1987-1988 through 1993-1994 crop years are set forth in RO1 through RO8 and RO10. Rotteveel has misplaced the assessment notice for the 1986-1987 crop year, but assumes it to be in the Almond Board's possession. (Rotteveel RO9, par. 1)

147. Rotteveel is a small handler of almonds and 80% of its almonds is shipped into the export market, and a significant part is shipped into the Netherlands from where the Rotteveels emigrated in 1962. (Rotteveel RO9, par. 1)

148. The Rotteveels promoted their product to their buyers by bringing the buyers from those export countries to Rotteveel's orchards and the processing plant. The Rotteveels have also traveled to Europe and Latin America to meet with prospective buyers and established buyers in order to develop new buyers and maintain their existing buyers. These travel costs are substantial but not creditable under the Almond Board's regulations. (Rotteveel RO9, par. 1)

149. Mr. Rotteveel testified that he believed that if his firm did not have to pay the money to the Almond Board or spend the money on permissible forms of advertising, the Rotteveels would use it instead to increase their market by doing more direct contact with existing and prospective customers, and increasing their processing lines in order to provide more buyers with the quality and packaging that they require. (Rotteveel RO9, par. 1)

150. Most of the time Rotteveel paid the money to the Almond Board on the earlier dates in order to earn the 150% credit. Sometimes the Rotteveels spent the money pursuant to the Board's rules and regulations but when they did so, in Mr. Rotteveel's opinion, it was a complete waste of money, and had

they instead retained the money, they could have promoted their product more effectively. (Rotteveel RO9, par. 2)

151. Mr. Rotteveel believes the credit-back program to be even worse than the creditable advertising program because the handler only receives two-thirds credit towards its expenditures, and even though there are more ways to receive credit under the new program, it still does not permit credit for the types of promotion and selling activities that Rotteveel uses. (Rotteveel RO9, par. 2)

152. Mr. Rotteveel testified that because the Rotteveels are from the Netherlands, Rotteveel has a great market there. But those buyers, he believes, are not impressed with advertising, they are impressed with the quality of product that Rotteveel can ship them and the direct communication with them; all of which costs money, but none of which is creditable under the Board's regulations. (Rotteveel RO9, par. 3)

153. Mr. Rotteveel does not believe that the Almond Board's generic promotional program assists the Rotteveels in marketing their product nor does it increase the return to their growers. (Rotteveel RO9, par. 3)

154. If the Rotteveels were left with their assessment dollars instead of having to pay those dollars to the Board or spend them in wasteful ways pursuant to the Board's regulations, they could, in Mr. Rotteveel's opinion, make more money and increase the grower returns. (Rotteveel RO9, par. 3)

155. Rotteveel does not deduct the Almond Board's assessment from its grower payments. (Rotteveel Tr. 457-458)

156. In Mr. Rotteveel's opinion, because the Almond Board's generic program has not targeted any of Rotteveels' customers, they have derived no benefit from the program. (Rotteveel Tr. 462-463)

157. The Rotteveels would like to use the money that they otherwise have to spend on the advertising assessment to purchase new lines of equipment to provide buyers with specialty almond products. (Rotteveel Tr. 467-468)

158. The buyers that Rotteveel deals with in Holland have increasingly purchased more and more product from Rotteveel, and it was not because of the Almond Board advertising program. (Rotteveel Tr. 471)

Central Valley Growers Packing

159. Central Valley Growers Packing is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Central Valley Growers Packing to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Central Valley Growers Packing seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Central Valley Growers Packing for the 1986-1987 marketing year and every subsequent marketing year.

160. Robert W. Christian is the sole owner of Central Valley Growers Packing, an independent almond handler during the

crop years 1986-1987 through the 1992-1993 crop year. Exhibit CVG1 through CVG6 are the Almond Board Assessment Notices showing the tonnage handled, and the creditable advertising assessments, for the crop years 1986-87 through the 1992-93 crop year. (Christian CVG7, par. 1; CVG1 through CVG6)

161. More than 90% of Central Valley's handle during those years was exported; primarily to Europe and the Far East. During the crop years in question, the Board had no export promotional program, only a domestic program. (Christian CVG7, par. 2)

162. Mr. Christian testified that in his opinion, none of the permissible forms of advertising under the creditable advertising program were beneficial to Central Valley. Central Valley found the best way to sell its almonds to its foreign buyers was personalized service, and meeting their demanding quality requirements. (Christian CVG7, par. 2)

163. Instead of spending the money on advertising programs pursuant to the regulations which it believed would be wasteful, Central Valley just paid the advertising assessments to the Almond Board in order to receive the 150% credit payment. (Christian CVG7, par. 2)

164. Mr. Christian testified that if Central Valley Growers did not have to pay the money to the Almond Board for its almond promotion program, Central Valley Growers would have used the money to further promote its product in the export market and paid the grower a higher return, but instead, the Board's generic promotion program and the creditable advertising assessments were a complete waste of money to Central Valley. (Christian CVG7, par. 2)

165. Central Valley Growers has no retail store shelf almonds, but sells its almonds as ingredients. (Christian CVG7, par. 2)

166. In Mr. Christian's opinion, much of the Almond Board's promotional program was designed to benefit Blue Diamond, and the creditable advertising regulations were fashioned to benefit Blue Diamond, not handlers like Central Valley. (Christian CVG7, par. 2)

167. Mr. Christian testified that if Central Valley Growers had retained the approximately $40,000.00 to $60,000.00 per year that it had to pay the Almond Board for assessments for the advertising program, Central Valley Growers would have instead spent more money on product research and development in an attempt to expand Central Valley's market and increase the grower returns. It was also his opinion that neither the Board nor Blue Diamond can do a better job of promoting Central Valley Growers' product than Central Valley Growers could if left with its money to do so. (Christian CVG7, par. 2)

168. Central Valley does not deduct Almond Board assessments from its grower payments. (Christian Tr. 226-227; CVG8)

Hocker Nut Farm

169. Hocker Nut Farm is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Hocker Nut Farm to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved

by the Almond Board. Hocker Nut Farm seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Hocker Nut Farm for the 1986-1987 marketing year and every subsequent marketing year.

170. Steve Hocker is a partner with his father in Hocker Nut Farm which has been a handler of almonds from and including the 1986-87 through the 1993-94 crop year. It is a small handler, handling the pounds of almonds listed in paragraph 1 of the Hocker declaration, HNF6, with some of those assessment notices for those crop years from the Almond Board attached as HNF1 through HNF5. (Hocker HNF6)

171. Approximately 95% of Hocker's product is exported into the foreign market and Hocker only sells brown almonds, not manufactured almonds. (Hocker HNF1)

172. Mr. Hocker testified that for his firm's type of business, the best way to promote the product is one-on-one conversation and salesmanship to their buyers. (Hocker HNF6, par. 2)

173. During the time of the creditable advertising rules, on occasion Hocker would take out an advertisement advertising its little country store selling almonds, but that was a complete waste of money; once the Board approved receiving 150% credit for early payments of the advertising assessments, virtually every year Hocker paid the Almond Board the money directly in order to receive the 150% credit. (Ex. HNF6, par. 2)

174. Under the new advertising credit-back regulations, there is no way to spend the money that would, in Mr. Hocker's

opinion, assist his firm in promoting its product. If Hocker had that money, instead of having to pay it to the Board, Hocker testified he would use it to increase the efficiency of Hocker's equipment and quality, in order to open up better markets, and with improved quality could receive higher return per pound for those almonds. (Ex. HNF6, par. 2)

175. Hocker does not deduct the assessments from what it pays its growers. (Tr. 252-253)

176. Hocker sells its almonds through personal contacts, and has communicated with manufacturers that do not currently use almonds, in an effort to convince them to use almonds in their products. (Tr. 254-255)

177. In Mr. Hocker's opinion, the way the Almond Board spent the assessment money was of direct benefit to Blue Diamond who had retail store shelf almonds, not to someone like Hocker who sold almonds for ingredients. (Tr. 257-258)

178. Mr. Hocker testified that it is his belief that the more efficient Hocker can be and the better product that Hocker can turn out, the better chance Hocker has to market that product at a higher price, and pay a higher return to the grower. (Tr. 261)

Bal Nut, Inc.

179. Bal Nut, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Bal Nut to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising

and promotion activities as specified and approved by the Almond Board. Bal Nut seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Bal Nut for the 1986-1987 marketing year and every subsequent marketing year.

180. Vito Balice is the president of Bal Nut, Inc. which was incorporated in 1989. Bal Nut is a small handler handling 150,000 to 300,000 pounds of almonds each year. 80% of its almonds are exported. (BN1, par. 1; Tr. 263-267)

181. Bal Nut believes the best way to promote its product is to travel to various countries to meet various buyers, engage in one-on-one sales efforts with those buyers, and have follow-up phone calls with those buyers; all of this is done to make the buyers feel comfortable that Bal Nut can supply the product they require. (BN1, par. 1)

182. Since 1989, Bal Nut has just basically paid the Almond Board the advertising assessments because Bal Nut could find no permissible way under the advertising regulations to use them that would actually promote Bal Nut's products. It did advertise almond butter once on radio in Wilkes-Barre, Pennsylvania, but the ad, which cost about $900.00 to air, only sold one pound of almond butter. (Tr. 272) Mr. Balice did not produce the advertising assessment notices and bills Bal Nut received, but believes that the Almond Board has records showing the amount of the advertising assessments for each of the years in question. (BN1, par. 1)

183. In Mr. Balice's opinion, Bal Nut receives no benefit whatsoever from the Almond Board's generic promotional program nor does it derive any benefit whatsoever from the

Board's creditable and credit-back advertising program. (BN1, par. 2)

184. In Mr. Balice's opinion, if Bal Nut had the money that it otherwise has to pay for the Almond Board's advertising programs, Bal Nut would install a bathroom at its warehouse and fix the roof which leaks and spend more time meeting with potential customers in order to expand Bal Nut's market, and if it could expand that market, it could expand to include more growers. (BN1, par. 2; Tr. 269)

185. Mr. Balice testified that his small company cannot afford a person to keep up with paperwork that is necessary to receive credit against advertising assessments, but Bal Nut is large enough that Mr. Balice does not have time to personally deal with the paperwork. (BN1, par. 2)

186. Mr. Balice believes he knows better than the Almond Board, the best way to promote Bal Nut's product in order to increase its profit and the amount it can pay growers. (BN1, par. 2)

Jardine Organic Ranch

187. Jardine Organic Ranch is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Jardine Organic Ranch to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Jardine Organic Ranch seeks to have the Almond Order's

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Promotion Plan and implementing regulations declared unlawful as they applied to Jardine Organic Ranch for the 1986-1987 marketing year and every subsequent marketing year.

188. Duane Jardine owns Jardine Organic Ranch and from the crop years 1986-87 through the 1994-95 crop Jardine has marketed only organically grown almonds, and organically grown almonds account for less than 1% of all of the almonds grown in California. (JOR1, par. 1)

189. Jardine is a very small handler, marketing anywhere from 40,000 to 120,000 pounds per year, and so the advertising assessment imposed by USDA and the Almond Board ranges anywhere from $1,000.00 to $3,500.00, which is a lot of money to Jardine. (JOR1, par. 1)

190. Some years Jardine exports 100% of its product, some years its domestic shipments are 100%, and some years it does both, but all of its buyers insist upon organically grown and processed almonds, and therefore Jardine's product does not compete with 99% of the almonds grown in California. (JOR1, par. 1)

191. Jardine's buyers are willing to pay a premium price for organically grown almonds. The Almond Board's promotional program has never promoted or advertised organically grown almonds, and Jardine does not want to be associated with any organization that does not promote organically grown products. (JOR1, par. 1)

192. Jardine markets its products, through contact by telephone and meeting potential buyers at Jardine's booth at food expeditions. Other buyers find out about his product through promotional work done by the Farm Verified Organic Program

which promotes certified organic products, which is not connected to the Almond Board. (JOR1, par. 2)

193. On several occasions Jardine has redesigned boxes and packaging using different labeling and sizes to accommodate customers, but that is not an expense which is creditable under the Almond Board regulations. (JOR1, par. 2)

194. Jardine has also spent money bringing customers to Jardine's premises, but that is not creditable under the Almond Board regulations. (JOR1, par. 2)

195. Jardine has received credit for billboard advertising in California, and is eligible for credit-back on its participation at food trade shows, but none of the other ways that Jardine would use to promote its product are creditable under the Almond Board regulations. (JOR1, par. 3; Tr. 288-289)

196. Jardine has been a long time critic of the Almond Board's advertising regulations and its generic program, because its program does not assist in selling organically grown almonds, and in Mr. Jardine's opinion, there is no way that the Almond Board can assist Jardine in promoting his organically grown almonds. (JOR1, par. 5)

B. The Almond Order and Its Promotion Program

197. The Secretary promulgated the Almond Marketing Order in 1950, pursuant to statutory authority, pertinent regulations and implementing rulemaking actions. 7 U.S.C. §§ 601 *et. seq.* (1994); 7 C.F.R. §§ 981.1-474 (1994); 15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).

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198. The Almond Order was promulgated to stabilize the almond industry. There were high levels of production that were predicted to continue. There was evidence that indicated that if current production levels continued, there would be a significant decrease in price. The Order's goal is to provide an "adjustment of the supply of almonds to the domestic trade demand," and as a result, increase grower returns. 15 Fed. Reg. 3623, 3624 (1950).

199. The Almond Order contains provisions for advertising and promotion by the Almond Board which administers the Order and the regulations which implement the advertising and promotion program. The Almond Board gives credit against "advertising assessments" to those handlers who engage in specified forms of branded advertising and brand promotion. The purpose of both the Board's generic advertising and promotion, which is paid for out of those "advertising assessments" actually collected from handlers, and for the branded advertising and promotion which the Promotion Program encourages, through the credits, is to achieve the Order's asserted goal.

200. The Almond Board's generic advertising and promotion activities seek to build demand through the changing of consumer preferences by providing information to manufacturers and end users about the essential features of almonds.

201. Increasing the demand for a product involves influencing consumer attitudes so that more of a product can be sold at the given price, the same amount can be sold at a higher price, or more of the product can be sold at a higher price.

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202. The marketing mix available to firms and organizations marketing products and services includes advertising, promotion, publicity and public relations.

203. Advertising is defined as paid broadcasting of a message in the television, radio, or print media. It can also involve the providing of point-of-purchase materials to retailers. Promotion involves the placing of information oriented messages such as a product's nutritional aspects or suggestions for its preparation, in the various media.

204. Since advertising is an efficient way of reaching a large number of people, organizations that market products that are aimed directly to consumers spend considerable sums on advertising.

205. An acceptable working definition of "generic advertising", which respondent has requested as a finding, is the cooperative effort among producers of a nearly homogenous product to disseminate information about the underlying general attributes of the product to existing and potential customers for the purpose of strengthening demand for the commodity.

206. An acceptable working definition of "branded advertising", which respondent has requested as a finding, is the effort of an individual firm in the product category that emphasizes the particular attributes of its brand as compared to competing brands.

207. Brand and generic advertising can be complementary when they have mutually reinforcing effects on consumer choice.

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208. The rationale for government compelled advertising and promotion assessments has been that everyone who benefits from advertising should share equitably in its cost and not be a "free rider."

209. All six agricultural economists called by the government as expert witnesses, Dr. Ronald Ward, Dr. Henry Kinnucan, Dr. Richard Sexton, Dr. Jason Christian, Dr. Hoy Carman, and Dr. Olan Forker, are experienced researchers on the impact of advertising on commodities. Dr. Russell Winer and Dr. Margaret Campbell, professors of marketing, are experts in the area of advertising theory. The agricultural economist called by petitioners, Professor Michael K. Mohlgenant is also an experienced researcher. Professor Scott Davis who was called by petitioners is an expert in the area of marketing and advertising theory as well as economics.

210. The testimony of the agricultural economists called by the government and the empirical results from their studies on various agricultural commodities confirm that cooperative generic advertising and promotion can be a viable tool for building demand and ultimately increasing producer returns.

211. In assessing the effectiveness of the Almond Order Promotion Program, it is important to note that there are two very distinct Almond Board advertising and promotion programs at issue.

212. The first, the "creditable advertising" program was in effect through and including the 1992-1993 season (July 1, 1992 to June 30, 1993 - 7 C.F.R. 981.10). This was essentially a program of creditable industry advertising with a small and ineffective Almond Board generic element.

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213. The second program, the "credit-back" program began with the 1993-1994 season. It envisions a large, amply funded generic advertising, promotion and public relations program operated by the Almond Board, with various efforts in both the domestic and export markets. It allows handlers to receive partial credit back for thirteen more forms of branded advertising and brand promotion efforts by handlers than were allowed as "creditable" under the former program.

214. Blue Diamond Growers, Inc, dominated the pre-1991 period of the "creditable advertising" program. Respondent has estimated that Blue Diamond represented well over 60% of the industry from 1960 through 1980 and after 1980, remained over 50% through the 1990-91 market year. Blue Diamond has generally sold approximately 90% of all almonds sold to the domestic retail trade either as snacks or for home cooking use.

215. During the 1987-88 through the 1990-91 marketing years, the total expenditure by the Almond Board for generic advertising, promotion and public relations ranged between $840,000 to $1,400,000 per year, whereas during the same time period, Blue Diamond spent $8,000,000 to $14,200,000 per year on its branded advertising which was primarily directed to the domestic retail market.

216. Algernon Greenlee is a retail business manager for Blue Diamond Growers, and for the previous six years had been the advertising manager. (Tr. Greenlee 297)

217. Blue Diamond sells almonds in approximately 96 countries around the globe. Domestically, Blue Diamond sells almonds to ingredients users and sells its own retail line of store shelf snack almonds. (Tr. Greenlee 298-299)

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218. Blue Diamond believes that its various types of advertising have been effective. (Tr. Greenlee 300)

219. Because the advertisement assessment rate was lowered, Blue Diamond has decreased the amount it spends on advertising. (Tr. Greenlee 306-307)

220. Blue Diamond had no research as to whether or not their advertisements actually increased consumption of Blue Diamond almonds. (Tr. Greenlee 314-317)

221. Blue Diamond will not advertise when it does not realize a favorable return on the dollars spent. (Tr. Greenlee 319-320)

222. Blue Diamond discontinued advertising their Can-A-Week advertising program because they did not see a return on the dollars spent. (Tr. Greenlee 320)

223. Blue Diamond has a sales force that calls on customers which it believes helps promote the sale of almonds. (Tr. Greenlee 321-322)

224. Blue Diamond believes that sales contacts with buyers does increase the overall demand for almonds. (Tr. Greenlee 332-333)

225. Blue Diamond would not support a total generic program run by the Almond Board. (Tr. Greenlee 333)

226. Blue Diamond is not convinced that the overall consumption of almonds would increase if the Almond Board had a straight generic advertising program. (Tr. Greenlee 333-334)

227. Blue Diamond does not need encouragement from USDA to promote its almond products and would continue to engage in branded advertising in the absence of the Almond Order's Promotion Program. (Tr. Greenlee 334-335)

228. For most of the years from 1980 through 1991-92 the creditable advertising assessment rates were 2 1/2 cents per pound. The Almond Board had a much smaller generic promotional program during that period of time and no foreign promotional program. (Tr. Greenlee 336)

229. Blue Diamond advertises because Blue Diamond believes that there is a return on that investment. (Tr. Greenlee 339)

230. When the advertising assessment rate was 2 1/2 cents per pound Blue Diamond believes that it hurt their returns to their growers; it did not earn Blue Diamond more than the 2 1/2 cents that was spent. (Tr. Greenlee 339)

231. The retail line of almonds, which includes snack almonds, almonds that a consumer would buy for baking purposes, and bulk almonds sold to the produce departments of grocery chains makes up only 20 to 30% of all almonds sold domestically or 10 to 15% of all of the almonds sold worldwide. (Tr. Greenlee 342-343)

232. Blue Diamond has close to 90% of that retail market. (Tr. Greenlee 343)

233. The primary other competition for the retail almond trade is from companies not regulated under the marketing order, such as Fishers and Planters. (Tr. Greenlee 343-344)

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234. The percentage of the domestic sales that go to the retail markets has not increased over the last five years. (Tr. Greenlee 344)

235. A premium price is paid for the retail almond line. (Tr. Greenlee 344)

236. Blue Diamond sets its advertising expenditures in accordance with the assessment rate. (Tr. Greenlee 338, 351) But Blue Diamond would continue to advertise without the compulsion of the marketing order. (Tr. Greenlee 339)

237. Blue Diamond is concerned that in the absence of the Almond Order's Promotion Plan, it would spend more money on advertising than competing independent packers. (Tr. Greenlee 351)

238. During the Almond Board's compelled advertising program when the creditable advertising assessment was usually set at 2 1/2 cents per pound, several major independent companies went out of business. (Tr. Greenlee 355-356)

239. Approximately 2 years ago the Board retained the firm of Hallberg and Schierson to determine the effectiveness of the Board's generic program, and it was their opinion that the Board's past program had not been effective. (Tr. Greenlee 356-357)

240. When the Almond Board began receiving "MPP Money" from the Federal Government for overseas advertising, Blue Diamond received the majority of the funds. (Tr. Greenlee 357-358)

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241. In approximately 1990, Blue Diamond spent approximately seven million dollars in television advertising, but today it is only spending two to three million dollars. If Blue Diamond thought that it was receiving $2 for every $1 of advertising money spent, it would spend more money. (Tr. Greenlee 363-364)

242. The price paid for almonds does not necessarily correlate with the return on acreage owned by a grower. (Tr. Greenlee 367-368)

243. As of the 1993-94 crop year, Blue Diamond marketed between 30 and 40% of the entire California tonnage, but received over 50% of the foreign agricultural service MPP funding to the almond industry. (Tr. Easter 374-376)

244. The vast majority of all almonds grown in California are sold as ingredients used in other products, with candies the largest ingredient usage, cereal being the second largest, ice cream being the third, and almonds used as snacks being a very small percentage of the sales of almonds. (Tr. Lundeen 1305-1308)

245. The previous Almond Board regulations gave handlers a financial incentive to purchase 1/2 ounce generic charity packs from the Almond Board, and several witnesses testified that they did so. (Ryan Tr. 406; Campos Tr. 593, 605) However, it is questionable whether the distribution of these packs to schools and charities increased the overall demand for almonds. (Phinney Tr. 2256) Dr. Campbell, the marketing expert called by USDA, agreed that managers in each handler's firm know best how to advertise and promote their products. (Tr. Campbell 1746-1747), and that personal selling can encourage

new product usage and improve overall demand for the product. (Tr. Campbell 1764)

246. Several of the USDA's experts admitted that many of their studies had indicated that other advertising and promotion programs had been failures, including those for avocados; (Tr. Carman 1166); apples, (Tr. Carman 1181); dairy, (Tr. Ward 1528); and beef, (Tr. Kinnucan 744). One of USDA's experts, Dr. Kinnucan, noted that there have been many other instances where economists found that generic advertising has been ineffective, although many of them are not published, because it is difficult to get the "failures" published. (Tr. Kinnucan 714)

247. Except for Dr. Jason Christian, of the School of Economics, University of California-Davis, none of the economic experts called by respondent had studied the effect of advertising in the almond industry. (Tr. Dr. Sexton 929-931; Tr. Dr. Carman 1176-1177; Tr. Dr. Kinnucan 731-733; Tr. Dr. Winer 776-778; Tr. Dr. Forker 853-856; Tr. Dr. Ward 1487-1490; Tr. Dr. Campbell 1733-1734)

248. Dr. Jason Christian prepared a written statement of his testimony (RX Ex. 252), authored a study entitled "Individual Industry Effects of Branded Advertising of California Almonds" (RX 31, numbered pages 320-344) in February of 1994 and produced another study of September 19, 1994 entitled "The Economic Effects of Advertising in the California Almond Industry" (RX 159). Dr. Christian was called by USDA as its primary expert witness as to the effectiveness of the Almond Board's advertising program (RX 252).

249. When the Almond Board contracted with Dr. Christian to research the economic effects of advertising in the California

almond industry, the only data on advertising expenditures given him was Blue Diamond's.

250. Dr. Christian found a direct correlation between the total volume of almonds sold and the amount Blue Diamond spent each year to advertise. He concluded that the more Blue Diamond advertised, the more demand increased. However, because Blue Diamond correlated its advertising budget to the amount of its annual advertising assessment which was computed on a per pound handled basis, the amount Blue Diamond spent on advertising was obviously greater in the years when the higher volumes were sold; and it may well be that higher sales volumes caused higher advertising expenditures by Blue Diamond, and not the other way around. (Dr. Wohlgenant, J. Pet #2, page 7, par. 6)

251. Dr. Christian's September 19, 1994 report (Rx 159), did not examine the effects of the Almond Board's generic advertising program.

252. None of Dr. Christian's studies measured the effect of advertising after 1992 and the Almond Board's current advertising and promotional activity was not examined by Dr. Christian. (Christian Tr. 1004)

253. Dr. Christian's study did not enable him to distinguish the impact Blue Diamond's advertising may have had on the sales of products containing almonds.

254. Dr. Christian's studies are unable to demonstrate differentiated advantages among growers or handlers attributable to Blue Diamond's advertising. (Christian Tr. 1005)

255. Dr. Christian did not undertake to answer whether the generic promotion by the Almond Board, or the brand advertising and promotion by handlers other than Blue Diamond had an effect on overall almond demand.

256. Professor Scott Davis of the Graduate School of Management. University of California-Davis, a trained economist and an expert in marketing and advertising, testified that inasmuch as the advertising conducted by Blue Diamond during the time period studied by Dr. Christian was primarily directed to the retail market (Can-A-Week), one would expect substantial growth in the demand by the household consumption market as compared to the share attributable to demand by ingredients buyers. However, the opposite was true. (Dr. Davis, J. Pet #1, page 8) It is found, therefore, as Dr. Davis asserted, that it is most improbable that Blue Diamond's advertising was the primary stimulator of increased demand by ingredients buyers.

257. Advertising in the United States has not caused the volume of exports to increase. (Christian Tr. 1007)

258. Although it may be that under "The Law of One Price", Blue Diamond's advertising helped it sell more almonds domestically, and this in turn resulted in Blue Diamond having less almonds for export which may have led to higher prices overseas, where demand is inelastic[8], it is not appropriate to characterize Blue Diamond's competitors as "free riders" who should be compelled to make equivalent expenditures in compensation for this kind of incidental benefit. This benefit is far too remote; it is unintended; and it is not proportional to the

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8. When demand is inelastic, a price increase will not result in a lessening of demand; when demand is elastic, an increase in price will decrease sales.

benefits realized by Blue Diamond in capturing additional sales in the more profitable domestic retail market.

259. There are a number of expenditures that go into the marketing mix, and advertising is only one element that can be used to expand the demand for a product. Other communication tools that are available include promotions, such as free samples or special displays, publicity (such as press releases that communicate new product benefits), personal selling, product improvement and improved availability which make the product more attractive to potential customers and raise their willingness to pay for the product. Christian's study never addressed the influence of these other selling techniques on raising the demand for almonds or on the grower return. (Dr. Davis, J. Pet. No. 1, page 2, pages 8-9, 13-14)

260. The advertising and promotional program permitted by the Board for credit and the promotional material published by the Almond Board seem unlikely to have stimulated demand by ingredient buyers, where most of the almonds are sold. (Dr. Davis, J. Pet. Ex. 1, page 8)

261. Growers have not significantly benefitted from the ineffective and inconsequential branded advertising and brand promotion by the independent handlers who compete with Blue Diamond, which the "creditable advertising" and the "credit-back" programs have induced. Nor have these branded advertisements and promotions more effectively expanded the overall market for almonds than would have resulted from the efforts of these handlers in the absence of the Almond Order's Promotion Plan.

Appendix B

Conclusions of Law

A. Respondent has the burden of proof in these proceedings. *Cal-Diamond, Inc. v. United States Department of Agriculture,* 14 F.3d 429 (9th Cir. 1993).

B. Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional program for the crop years 1986-87 through 1994-95 directly advanced the governmental interest of selling more almonds and increasing returns to growers which USDA asserted in justification of its regulation of petitioners' commercial speech.

C. Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional program for the crop years 1986-87 through 1994-95 was no more extensive than necessary to serve the governmental interest of selling more almonds and increasing returns to growers which USDA asserted in justification of its regulation of petitioners' commercial speech.

D. For the foregoing reasons, the Almond Board's advertising and promotional program for the crop years 1986-87 through 1994-95 was not in accordance with law.

Done at Washington, D.C.
this 15th day of June, 1995

s/ Victor W. Palmer
VICTOR W. PALMER
Chief Administrative Law Judge

APPENDIX C — 7 C.F.R. § 981.441

7 CFR Sec. 981.441, Credit for market promotion activities, including paid advertising.

Excerpt from page 24790 follows

CODE OF FEDERAL REGULATIONS
TITLE 7 — AGRICULTURE
SUBTITLE B — REGULATIONS OF THE DEPARTMENT OF AGRICULTURE
CHAPTER IX — AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS)
PART 981 — ALMONDS GROWN IN CALIFORNIA
SUBPART — ADMINISTRATIVE RULES AND REGULATIONS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 981.441 Credit for market promotion activities, including paid advertising.

(a) In order for a handler to receive credit for his/her own promotional activities from his/her pro rata portion of advertising assessment payments, pursuant to Sec. 981.41(c), the Board must determine that such expenditures meet the applicable requirements of this section. Credit will be granted either in the form of a payment from the Board, or as an offset to the advertising assessment if activities are conducted and documented to the satisfaction of the Board at least two weeks prior to assessment billings. Credit, hereinafter termed 'Credit-Back', will be granted in an amount not to exceed 66 2/3 percent of a handler's proven expenditures for qualified activities.

(b) The portion of the handler assessment for which credit may be received under this section will be billed, and is due and payable, at the same time as the portion of the handler assessment used for the Board's administrative expenses, unless the handler(s) conduct and document activities at least two weeks prior to assessment billings. In the latter case, handlers' advertising assessment obligations will be reduced according to the amount of proven activities approved by the Board.

(c) The Board shall grant Credit-Back for qualifying activities only to the handler who performed such activities and who filed a claim for Credit-Back in accordance with this section.

(d) Credit-Back shall be granted only for qualified promotional activities which are conducted and completed during the crop year for which Credit-Back is requested.

(e) The following requirements shall apply to Credit-Back for all promotional activities:

(1) Credit-Back granted by the Board shall be that which is appropriate when compared to accepted professional practices and rates for the type of activity conducted. In the case of claims for Credit-Back activities not covered by specific and established criteria, the Board shall grant the claim if it is consistent with practices and rates for similar activities. To this end, the Board may issue guidelines for qualifying activities from time to time as warranted. For activities in markets other than the United States and Canada, paragraph (e)(5) of this section shall also apply.

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Excerpt from page 24791 follows

(2) The clear and evident purpose of each activity shall be to promote the sale, consumption or use of California almonds, and nothing therein shall detract from this purpose.

(3) No Credit-Back will be given for advertising placed in publications that target the farming or grower trade. No Credit-Back shall be given for any outdoor advertising or sponsorships in the California almond growing counties of Butte, Colusa, Fresno, Glenn, Kern, Madera, Merced, Sacramento, San Joaquin, Stanislaus, and Tulare counties, except that, outdoor advertising in these counties which specifically directs consumers to a handler-operated outlet offering direct purchase of almonds will be eligible for Credit-Back.

(4) Credit-Back shall be granted for those qualified activities specified below, except that Credit-Back for travel expenses will not be allowed in any case.

(i) Paid advertising directed to end-users, trade or industrial users. Credit-Back shall be granted for money spent on paid advertising space or time including, but not limited to, newspapers, magazines, radio, television, transit and outdoor media, and including the standard agency commission costs not to exceed 15 percent of gross.

(ii) Other market promotion activities. Credit-Back shall be granted for market promotion other than paid advertising, for the following activities:

(A) Marketing research (except pre-testing and test-marketing of paid advertising);

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(B) Trade and consumer product publicity;

(C) Printing costs for promotional material;

(D) Direct mail printing and distribution;

(E) Retail in-store demonstrations;

(F) Point-of-sale materials (not including packaging);

(G) Sales and marketing presentation kits;

(H) Trade fairs and exhibits;

(I) Trade seminars;

(J) 50/50 advertising with retailers;

(K) Couponing (printing, distribution and handling costs only);

(L) Purchase of Board produced promotional materials; and

(M) Sponsorships

(iii) For any qualified activity involving joint participation by a handler and a manufacturer or seller of a complementary product(s), or a handler selling multiple complementary products, including other nuts, with such activity including the handler's name or brand, or the words 'California Almonds', the amount allowed for Credit-Back claim shall reflect that portion

of the activity represented by almonds, or the handler's actual payment, whichever is less.

(iv) When products containing almonds are promoted, the amount allowed for Credit-Back shall reflect that portion of the product weight represented by almonds, or the handler's actual payment, whichever is less. In addition, the product must display the handler's name or brand, or the words 'California Almonds' on the primary, face label.

Excerpt from page 24792 follows

(5) Credit-Back for promotional activities in a foreign market shall be granted at 66 2/3 percent of a handler's unreimbursed expenditures for qualified activities in any foreign market, if the handler is promoting pursuant to a contract with the Foreign Agricultural Service, USDA (FAS) and/or the California Department of Food and Agriculture (CDFA). Such activities must also meet the requirements of paragraphs (e) (1), (2), (3), (4), and (6) of this section. Unless the Board is administering the foreign marketing program, such activities shall not be eligible for Credit-Back unless the handler certifies that he/she was not and will not be reimbursed by either FAS or the CDFA for the amount claimed for Credit-Back, and has on record with the Board all claims for reimbursement made to FAS and/or the CDFA. Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA will not be eligible for Credit-Back.

(6) A handler must file claims with the Board to obtain Credit-Back for promotional expenditures, as follows:

(i) All claims submitted to the Board for any qualified activity must include:

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(A) A description of the activity and when and where it was conducted;

(B) Copies of all invoices from suppliers or agencies;

(C) Copies of all canceled checks issued by the handler in payment of these invoices; and

(D) An actual sample, picture or other physical evidence of the activity.

(ii) Handlers may receive credit against their assessment obligation up to the advertising amount of the assessment installment due; Provided: That the handler submits the required documentation for a qualified activity at least two weeks prior to the mailing of assessment notices from the Board. In all other instances, handlers must remit the advertising assessment to the Board when billed, and a refund will be issued to the extent of proven, qualified activities.

(iii) Checks from the Board in payment of approved Credit-Back claims will be mailed to handlers on February 15, April 15, June 15, and 30 days after submission of final claims for the crop year pursuant to paragraph (e)(6)(iv) of this section. To receive payment on these dates, handler claims must be submitted, with all required elements, at least one month prior to the payment date. A handler can receive Credit-Back for his/her allowable direct expenditures only up to the amount of that portion of the handler's assessment designated for marketing promotion, including paid advertising.

(iv) A statement of the Credit-Back commitments outstanding as of the close of a crop year must be submitted in full

to the Board within 15 days after close of that crop year. Final claims must be submitted within 105 days after the close of that crop year.

(f) Appeals. If a determination is made by the Board staff that a particular promotional activity is not eligible for Credit-Back because it does not meet the criteria specified herein, or for any other reason, the affected handler may request the Public Relations and Advertising Committee to review the Board staff's decision. If the affected handler disagrees with the decision of the Public Relations and Advertising Committee, the handler may request that the Board review the Committee decision. If the handler disagrees with the decision of the Board, the handler, through the Board, may request that the Secretary review the Board's decision. Handlers have the right to request anonymity in the review of their appeal. The Secretary maintains the right to review any decisions made by the aforementioned bodies at his/her discretion.

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No. 95-1879

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioner,

vs.

CAL-ALMOND, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF ALMOND HULLERS AND PROCESSORS ASSOCIATION, STUART WOOLF, TONY CAMPOS, CAMPOS BROS., KEN CUNNINGHAM, HUGHSON NUT MARKETING, PARAMOUNT FARMS, NED RYAN, RYAN PARREIRA ALMOND COMPANY, PANOCHE CREEK FARMS AND HARRIS WOOLF CALIFORNIA ALMONDS IN SUPPORT OF PETITION

KENDALL L. MANOCK
Counsel of Record
CHARLES K. MANOCK
BAKER, MANOCK & JENSEN
Attorneys for Amici Curiae
5260 North Palm Avenue
Suite 421
Fresno, California 93704-2209
(209) 432-5400

9046
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
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Almond Hullers and Processors Association, Stuart Woolf, Tony Campos, Campos Bros. Farms, Ken Cunningham, Hughson Nut Marketing, Paramount Farms, Ned Ryan, Ryan Parreira Almond Company, Panoche Creek Farms and Harris Woolf California Almonds submit this brief as *amici curiae* in support of the petition of the Solicitor General for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

CONSENT BY THE PARTIES

Written consent to file this *amicus* brief has been obtained from all parties to the action. The written consents are lodged herewith.

STATEMENT

This brief is filed on behalf of a wide cross-section of the almond industry which includes individual handlers and the Almond Hullers and Processors Association which comprises approximately 85 percent of all the almond tonnage in California. The *amici* own and operate almond processing facilities and, in many cases, individually farm almond orchards. Most of their operations are relatively small and generally are without adequate resources to mount major national advertising promotional and marketing programs on an individual basis.

The outcome of this case will significantly affect the almond industry of California and directly impact each of the *amici* and their members and owners. All of them operate their businesses subject to the provisions of the Marketing Order for California Almonds, 7 C.F.R. 981.13, *et seq.*, issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.* It authorizes mandatory assessments for advertising, promotions and marketing

programs under the direction of the Secretary of Agriculture on the recommendation of a Board representing growers and handlers appointed by the Secretary.

The validity of the programs for the California almond industry are now in serious question because of the decisions by the Ninth Circuit Court of Appeal in *Cal Almond, Inc. v. USDA*, 14 F.3d 429 (9th Cir. 1993) ("*Cal Almond I*") and *Cal Almond, Inc. v. USDA*, 67 F.3d 874 (9th Cir. 1995) ("*Cal Almond II*") *Cal Almond I* held that the mandatory assessments violated the First Amendment rights of free speech of the complaining handlers and remanded the matter to the District Court to determine the remedy. In *Cal Almond II* the District Court's order refunding the full amount of the assessments paid to the Almond Board since 1980 was affirmed, but the order providing for the reimbursement of payments by the complaining handlers to third parties for their own advertising was reversed. These two decisions have left the almond industry in disarray and the Almond Board uncertain as to what programs it can recommend to the Secretary, what assessments can be proposed for what purpose and what assessments are still subject to challenge by objecting handers.[1] Since all of these decisions are subject to administrative review as provided in 7 U.S.C. § 608(C)(15)(a) they involve lengthy proceedings, first before the Secretary of Agriculture and then through the federal court system. A process which could take many years to resolve.

After *Cal Almond I*, but before *Cal Almond II* became final, the Ninth Circuit decided *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995). Relying on *Cal Almond I*, it held that a similar mandatory assessment program for advertising in the tree fruit industry violated the First Amendment. After the

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1. Both decisions are now subject to certiorari. *Mercer v. Theriot*, 377 U.S. 152 at 153-154, 84 S. Ct. 1157 (1964).

Solicitor General filed his petition for certiorari in *Cal-Almond*, this court granted certiorari in *Wileman. Daniel R. Glickman, Secretary of Agriculture, Petitioner v. Wileman Bros. & Elliott, Inc., et al., Respondents,* (No. 95-1184) __ S. Ct. __, 1996 W.L. 38051 (U.S. III); 64 USLW 3519 (June 3, 1996) ("*Wileman*").

The current status of the *Cal Almond* case poses a dilemma for the *amici*. The almond industry in California is one of over 250 agricultural industries with commodity promotion and research programs operating under federal and state law in the United States. O.D. Forker and R.W. Ward, *Commodity Advertising: The Economics and Measurements of Generic Programs,* 183 Lexington Book (1993). If the *Cal Almond* petition for writ of certiorari is not held as requested by the Solicitor General, the *Cal Almond* case will become final; the Almond Marketing Order will be subject to the First Amendment test and remedy applied by the Ninth Circuit Court of Appeals; and the almond industry alone, among all other commodity groups, will not be subject to this Court's determination of *Wileman*.

CONCLUSION

To prevent the imposition of the First Amendment issues raised in *Cal Almond I* and the remedy issues raised in *Cal-Almond II,* the petition for a writ of certiorari by the Solicitor General in the *Cal Almond* case should be held and disposed of as appropriate in accordance with this Court's decision in *Wileman.*

Respectfully submitted,

KENDALL L. MANOCK
Counsel of Record
CHARLES K. MANOCK
BAKER, MANOCK & JENSEN
Attorneys for Amici Curiae
5260 North Palm Avenue
Suite 421
Fresno, California 93704-2209
(209) 432-5400

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No. 95-1879

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONER

v.

CAL-ALMOND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONER

v.

CAL-ALMOND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents err in asserting that this Court lacks jurisdiction over the petition for a writ of certiorari because the Department of Agriculture did not seek review of the initial decision of the court of appeals addressing the First Amendment question presented in the petition. Br. in Opp. 2, 6, 9 (citing 28 U.S.C. 2101; Sup. Ct. R. 13.1). In its first opinion, the court of appeals held that the generic advertising program established pursuant to the marketing order for California almonds issued by the Secretary under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, impermissibly burdened respondents' rights of free speech and association. In that opinion, the court expressly declined to rule on "the question of what remedy to grant to [respondents]." Pet. App. 94a. Rather, due to the "fact-

intensive nature of the inquiry" into respondents' claim for "a full refund of the assessments" imposed under the challenged marketing order, the court of appeals remanded the case to the district court for determination of an appropriate remedy. *Id.* at 94a-95a. The Ninth Circuit's initial decision was therefore interlocutory.

It has long been established that this Court "generally await[s] final judgment in the lower courts before exercising * * * certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari).[1] Further, failure to seek Supreme Court review of a ruling by a court of appeals at an interlocutory stage of a case does not preclude a petitioner from raising the same issue in a

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[1] The Court "has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals * * * whose judgments are reviewable pursuant to [28 U.S.C.] § 1254(1)." R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 195 (7th ed. 1993). Although the Court ordinarily declines to exercise its discretionary certiorari jurisdiction to review interlocutory orders, the Court occassionally grants certiorari to review a nonfinal judgment involving a conflict on a question of law with another court of appeals, or where the nonfinal judgment raises an important question of law. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893); Stern, Gressman, Shapiro, *supra*, at 196-197. Thus, there is no merit to respondents' suggestion that either the government's petition for a writ of certiorari in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, cert. granted, 116 S. Ct. 1875 (1996) (No. 95-1184), was "premature (because the remedy had not been addressed) or the petition filed in the instant case is far too late" because it was filed after final judgment on the remedial issues. See Br. in Opp. 11.

later petition, following the entry of a subsequent final judgment by the court of appeals. *Ibid.* Indeed, the Court may consider on certiorari "'all of the substantial federal questions determined in the earlier stages of the litigation . . . ,' [including] questions raised on the first appeal, as well as 'those that were before the Court of Appeals upon the second appeal.'" *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (per curiam) (quoting *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955), and *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916)).[2] Accordingly, this Court has jurisdiction over the certiorari petition in this case.

2. Nor is there any merit to respondents' contention (Br. in Opp. 16-19) that the Court should not hold the petition for a writ of certiorari in the present case for disposition in light of the Court's decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184, in which the Court has granted certiorari. 116 S. Ct. 1875 (1996). Respondents concede (Br. in Opp. 17) that the Court's decision in *Wileman Bros.* will affect the constitutionality of the marketing order at issue in this case. Respondents further acknowledge (*id.* at 17 n.8) that the Judicial Officer of the Department of Agriculture has reserved ruling on respondents' administrative petitions challenging the new creditable advertising regulation on First Amend-

[2] *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-379 (1965), on which respondents rely (Br. in Opp. 9, 11), does not state a different rule. The court of appeals here clearly did more by its second judgment than merely restate what it decided in its first opinion. The court not only reiterated its earlier holding, but also fully addressed the district court's resolution of the remedial issues, affirming the lower court's decision in part, and reversing it in part. Pet. App. 4a-17a.

ment grounds pending this Court's decision in *Wileman Bros.* Respondents' contentions regarding aspects of the current creditable regulation, and the pending administrative challenges thereto, are therefore not presented in this case.

Respondents also mischaracterize the way in which the almond promotion program operated during the time period relevant to this litigation. The almond marketing order authorized the Almond Board (Board) to incur expenses in carrying out its functions, and accordingly provided for the collection of assessments from handlers, determined according to the total volume of almonds handled. 7 C.F.R. 981.80, 981.81 (1992). Contrary to respondents' assertions (Br. in Opp. 6, 8, 12), the annual assessments were not broken down into components for various activities (*i.e.*, there was no "creditable advertising assessment" and no separate assessment for generic promotion and advertising activities conducted by the Board).[3] Rather, there was one assessment, covering all Board activities. 7 C.F.R. 981.81(a) (1992). As explained in our petition (Pet. 7), the former creditable advertising regulation permitted a handler to satisfy its pro rata assessment obligation either by paying the full assessment to the Almond Board, or by conducting paid brand and/or generic advertising and promotional activities for credit against the assessment. 7 C.F.R. 981.441(c)(3)(i)(A) and (B),

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[3] Further, during the crop years involved in respondents' challenge to the almond marketing program, the Board did not conduct its own advertising. Rather, it engaged only in generic almond promotion activities such as distributing almond recipes and promotional materials for school lunch programs. See Pet. App. 52a-53a.

981.441(d)(1)(i), (ii) and (iii) (1992). In that respect, all assessments imposed on handlers funded the generic advertising program for almonds.

In light of the almond promotion program's structure, and the breadth of the court of appeals' ruling below, the constitutionality of the former creditable advertising regulation is plainly included within the question presented here. As we have stated, however, "the manner in which the First Amendment applies to the particulars of the former creditable advertising regulation in the marketing order for California almonds" is of "no continuing importance." Pet. 16.[4] We therefore have urged the Court to hold our petition in this case rather than grant plenary review. *Ibid.*

Nor does the fact that the present case was initiated by respondents before *Wileman Bros.* and has "proceeded through the remedy phase" (Br. in Opp. 17) justify plenary review. Indeed, respondents offer no substantial reason for the Court to order full briefing and argument here, now that the Court has granted review in *Wileman Bros.* The court of appeals concluded in this case that the "entire assessment-funded almond promotion program" violated respondents' First Amendment rights under the test for reviewing restrictions on commercial speech announced in *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). Pet. App. 67a-68a. The court of appeals then expressly relied on that First Amendment analysis in *Wileman Bros.* in reaching a similar conclusion regarding the assessment-funded promotion programs for peaches, nectar-

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[4] This case is not moot, however, because the court of appeals has affirmed the district court's order requiring the refund of past assessments. Pet. App. 17a.

ines, and plums. The petition should therefore be held pending this Court's disposition in *Wileman Bros.*

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For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, cert. granted, 116 S. Ct. 1875 (1996).

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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